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REPORTS OF CASES

DECIDED IN THE

APPELLATE COURTS

OF THE

STATE OF ILLINOIS

**SUBMITTED AT THE AUGUST TERM, 1893, AND THE FEBRUARY TERM, 1894,
OF THE FOURTH DISTRICT; AND THE OCTOBER TERM,
1893, AND THE MARCH TERM, 1894, OF
THE FIRST DISTRICT.**

VOL. LIV.

REPORTED BY
MARTIN L. NEWELL
OF THE SPRINGFIELD BAR

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HENRY M. SHEPARD, “ “ “

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CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FOURTH DISTRICT—AUGUST TERM, 1893.

C. Aultman & Co. v. Frank X. Wirth and J. G. Wirth.

1. **WAIVER—Of Contract by Acceptance of Notes.**—Aultman & Company sold an engine under a contract, conditioned, among other things, that the purchaser should give his notes for the same secured by chattel mortgage, but the notes being made and accepted by the company without mention of the mortgage, *it was held* that the provisions of the contract in this respect were waived.

2. **SAME—Of Notice Under the Provisions of a Contract of Warranty.**—Aultman & Company sold an engine under a contract of warranty, providing that a specific notice within a certain time, if the engine failed to fill the warranty, should be given. The engine did not fill the warranty and notice was given, but not according to the requirements of the contract. The company, however, received the notice without objection, and sent an employe to remedy the defects, and this was held to be a waiver of the insufficiency of the notice.

3. **RESCISSION—Of Contracts.**—Aultman & Company sold an engine under a warranty and took in payment notes of the purchasers. The engine failed to fill the warranty and the purchasers returned it, but received it again for further trial under the contract and gave it a further trial; they kept it from two to three months without notice to the company; “Left it out in Ramstead’s field till the water came up so high it had to be moved,” when they took it to town and left it near the place of business of the company’s agent in a damaged condition. *It was held* that the purchasers were not then in a condition to rescind the contract, and recover the amount of the notes they had given with interest thereon.

4. **JURY—Duty to Find Facts.**—It is for the jury to find facts from the evidence under proper statements of the law as to every phase of the case presented by the evidence.

Memorandum.—Assumpsit. Breach of warranty. Appeal from the Circuit Court of Wabash County; the Hon. SILAS Z. LANDES, Judge, presiding. Heard in this court at the August term, 1893. Reversed and remanded. Opinion filed June 23, 1894.

APPELLANT'S BRIEF, C. S. CONGER, ROBERT BELL AND FRANK W. BABCOCK, ATTORNEYS.

"Where a party bases his right to recover upon a contract containing conditions precedent or concurrent conditions to be performed by him, he must both allege and prove performance or a good offer to perform the conditions devolved upon him by the terms of the contract, before he can hold the other party liable for its breach." *Dunham v. Pettee*, 8 N. Y. 508; *Case v. Vennum*, 23 N. W. Rep. 563; *Tiedeman on Sales*, S. 213, p. 322, cases; *Wendell v. Osborne*, 63 Ia. 99, 18 N. W. Rep. 709; *Bayliss v. Hennessey*, 54 Ia. 11, 6 N. W. Rep. 46; *Pitts v. Spitznogle*, 54 Ia. 36, 6 N. W. Rep. 71; *Davis v. Robinson*, 67 Ia. 355, 25 N. W. Rep. 280; *King v. Towsley*, 64 Ia. 75, 19 N. W. Rep. 859; *Prairie Farmer Co. v. Taylor*, 69 Ill. 440; *Abbott's Trial Ev.* 313; *Lewis & Jackson v. Hubbard*, 69 Tenn. 436; *Edgerly v. Gardner*, 9 Neb. 130, 1 N. W. Rep. 1004, 1007; *Plano Mfg. Co. v. Root*, 54 N. W. Rep. 924; *Nichols, Sheperd & Co. v. Larkin*, 79 Mo. 264, 271; *Russell v. Murdock*, 79 Ia. 101, 44 N. W. Rep. 237; *Nichols v. Knowles*, 31 Minn. 489, 18 N. W. Rep. 413, 414; *Worden v. Harvester Co.*, 11 Neb. 116, 7 N. W. Rep. 156; *Fahey v. Esterly, etc., Mach. Co.* (1893), 55 N. W. Rep. 530; *Bishop on Cont.*, Secs. 586, 1422; 3 Am. and Eng. Encyc. L. 911, etc.; *C. Aultman & Co. v. Wykle*, 36 Ill. App. 293.

"A vendor engaging to warrant the quality, may make the warranty either absolute or conditional." *Bomberger v. Griener*, 18 Ia. 477.

"Where, in a contract of warranty, there are certain conditions precedent to be observed and performed by the purchaser, he must show a fair, reasonable compliance with the terms of the contract on his part, or he will not be permitted to enforce it against the warrantor." *Nichols v. Hale*, 4 Neb. 210; *Edgerly v. Gardner*, 9 Neb. 130, 1 N. W. Rep.

1004, 1007; Nichols, Sheperd & Co. v. Larkin, 79 Mo. 264, 271; Worden v. Harvester Co., 11 Neb. 116, 7 N. W. Rep. 156; Case v. Vennum, 23 N. W. Rep. 563.

“Before the purchaser after a sale can recover back the purchase price, on the theory of breach of warranty and rescission, he must fully perform all conditions precedent on his part to be performed, according to the terms of the warranty.” Fahey v. Esterly, etc., Mach. Co., 55 N. W. Rep. 530.

It is a familiar principle that a party desiring to rescind a contract must act promptly and that delay which prejudices the other party will defeat the right to rescind. 21 Am. and Eng. Encyc. L. 77, etc.

One who voluntarily disables himself or puts it out of his power to carry out a contract, thereby breaks his contract, and becomes immediately liable, and can not enforce performance by the other party. Bishop on Contracts, Sec. 1426; Crist v. Armour, 34 Barb. 378; Smith v. Lewis, 24 Conn. 624, 63 Am. Dec. 180; Newcombe v. Brackett, 16 Mass. 161; Cooper v. Mowry, 16 Mass. 5, 7; Lovering v. Lovering, 13 N. H. 513; Delamater v. Miller, 1 Cow. 75; Wolfe v. Marsh, 54 Cal. 228.

APPELLEE'S BRIEF, MUNDY & ORGAN, ATTORNEYS.

Waiver is where one in possession of any right conferred by law or contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right, or of his intention to rely upon it; he is said to have waived it, and he is precluded from claiming anything by reason of it afterward. Bishop on Contracts, 794, 795; Defenbaugh v. Weaver, 87 Ill. 132.

After the choice is made, and by words or acts expressed in manner suited to the case, he can not reverse it. He is said to have elected the one step and waived the other.

The waiver may be by acts after, the same as before default; as, where one acquiesces in the doing to-day of what ought to have been done yesterday. Bishop on Contracts,

pp. 797, 808; Low v. Pardee, 48 Ill. 466; Nibbe v. Braugh, 24 Ill. 268.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

Appellants sold a twelve-horse power thresher engine to Frank X. Wirth and John G. Wirth, appellees, under a contract, whereby the engine was warranted to be made of as good materials and, with proper use and management, to do as good work as any other of its size, made for the same purpose, in the United States. Before the purchasers could avail themselves of this warranty, they were required to give a specific notice within a certain time if the engine failed to "fill the warranty," whereupon appellants were to have an opportunity to get to the machine and remedy the defect. If the engine could not then be made to "fill the warranty," the purchasers were to return it to the place where it had been received, and appellants were to furnish another engine which would do the work, or return the money or notes which had been given for the defective engine.

When the engine was delivered, notes, amounting in the aggregate to \$1,100, were given in payment therefor. These notes, except as to the total amount thereof, were not strictly according to the letter of the contract, neither were they secured by a chattel mortgage on the engine as the contract required; but the rigorous provisions of the contract upon that question were waived when appellants accepted the notes, as they did, by compelling their agent at Mt. Carmel, contrary to his agreement with appellees, to forward the notes to the company at Canton, Ohio, and by retaining the notes in their possession as theirs under the contract.

There was evidence tending to show that the engine did not fill the warranty. Notice of this fact was given. It is alleged that the notice was not according to the requirements of the contract. However that may be, appellants received the notice and sent an employe to remedy the defects, which amounted to a waiver of the insufficiency of

the notice. Appellees insisted that the defects in the engine had not been remedied and so, in July, they returned the engine to Stayton, the local agent at Mt. Carmel, and demanded the notes.

Soon afterward the engine was put into the possession of Frank X. Wirth for trial again, and upon its failing to work satisfactorily, as he contends, it was left in the open air, exposed and unprotected, till some time in October, when it was used for hulling some clover seed, and then returned to Stayton at Mt. Carmel. Stayton refused to receive it, and the engine was left near his place of business.

It is said by appellees that the engine was forced upon them the second time, and that they did not receive it for trial again under the contract. We think, however, that there was evidence tending to show (and it is unnecessary for us to say more), that appellees did receive the engine for further trial under the contract, and did give it a further trial; that they kept it from two to three months without notice to appellants, or any of their agents, that it did not do satisfactory work, and without covering or protecting it in any manner whatever; that it was left for a time in Ramstead's field and was afterward moved by him into his yard. Frank X. Wirth swears as follows on this point: "He (Ramstead), left it there (in his yard) till the water was coming up around it; and when the water got up so high we thought we had better get it to town; so we got the engine out of there and brought it to Mt. Carmel." The evidence was uncontradicted that, at the last time when the engine was returned to Mt. Carmel, it was damaged, in consequence of the exposure, to the extent of from \$300 to \$650.

If the jury found the facts to be as above stated, and they could reasonably have done so under the evidence, then appellees were not in a condition in October to rescind the contract and recover the whole amount of the notes they had given with interest thereon.

To authorize such a recovery in such a case, appellees must have taken reasonably good care of the engine while it was in their possession. They could not suffer it to be un-

necessarily exposed to rain and sunshine, thus to become rusted and otherwise injured to the extent of from one-fourth to one-half of the price thereof, and then assert the right to rescind the contract upon the same terms as if the engine had not received such injury while it was in their hands. The citation of authorities in support of so plain a proposition is deemed unnecessary. In fact, upon the trial of this case, counsel for appellees virtually admitted this to be the law, but sought to parry the effect of the admission by asserting that the rule was not applicable to the facts of this case. But it was for the jury to find the facts from the evidence, under a proper statement of the law as to every phase of the case presented by the evidence.

In view of the foregoing facts, it was error for the court to give appellee's second instruction, which is as follows :

- “If the jury believe from the preponderance of the evidence that the plaintiffs purchased the machine in question from the defendant, and that the defendant warranted it to do as good work as any engine of the same size made for the same purpose in the United States, and the weight of the evidence shows that it failed to do so, by reason of some defects in its construction, and that plaintiffs gave notice in the manner and within the time required by the contract to the defendant of that fact, and the defendant sent its employes to the engine to remedy the defect, and they failed to remedy it, and the engine was returned to the place where it was received as provided by the contract and the notes given therefor demanded, and defendant refused or neglected to return said notes and failed to furnish another engine to do the work, then plaintiffs are entitled to recover the amount for which said notes were given on the purchase of the engine with interest at five per cent from the return of engine.”

Under this instruction, which was the only one that stated the amount which might be recovered, the jury found for appellees and assessed their damages at the full amount for which the notes had been given with interest thereon. A simple computation shows that the interest allowed was five

per cent on \$1,100 for exactly one year and nine months. The verdict which was for \$1,196.25, was rendered on April 20, 1893.

It is thus apparent that the verdict of the jury was based upon the first return of the engine, which was in July, 1891, and that they ignored all that occurred after that time, including the damages to the engine by exposure. This was precisely what the instruction above quoted authorized them to do. It required a verdict for appellees for the full amount of the notes with interest, regardless of what occurred after the first return of the engine in July. Under this instruction the verdict must have been as it is, even though the jury may have believed from the evidence that the engine was taken by appellees on trial again under the contract during the latter part of July, and was injured one-half of what it had cost by unnecessary exposure while in appellees' custody. The error in this instruction was not cured by other instructions given, but on the contrary it was emphasized by the modification of appellant's eighth instruction.

Many other reasons are urged for the reversal of the judgment, but most of them, as, for instance, certain objections to the declaration, consisting of grammatical blunders in the use of pronouns, and certain alleged variances between the declaration and the evidence, are hypercritical, and do not merit serious consideration.

We see no reason, as was suggested when this case was before us in 1892, why this suit can not be maintained in the names of Frank X. Wirth and John G. Wirth, who actually signed the contract, for the use of Frank X. Wirth, for whom the engine was bought, and who is therefore the individual really and beneficially interested. *Aultman & Co. v. Wirth et al.*, 45 Ill. App. 614.

For the reasons indicated herein, the judgment is reversed and the cause is remanded.

**M. C. Campbell and O. S. Tippy v. George H. Goodall,
Admr., etc., for the use of the Widow and
Heirs of Thomas Davis, Dec'd.**

1. **ESTOPPEL—Equitable, Grounds of.**—The doctrine of equitable estoppel is based on the ground of promoting the justice and equity of the individual case, by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth.

2. **SAME—In Pais—Mutuality.**—An estoppel *in pais* must operate on both parties. Mutuality is essential.

3. **SAME—Based Upon Fraudulent Purposes.**—The doctrine of estoppel *in pais*, or equitable estoppel, is based upon a fraudulent purpose and a fraudulent result. If, therefore, the element of fraud is wanting there is no estoppel, as, if both parties were equally cognizant of the facts and declaration, and silence of one party produced no change in the conduct of the other, he must be held as acting solely on his own judgment.

4. **SAME—Fraudulent Intention.**—Estoppels are founded on intention and can not be extended to objects which the parties can not reasonably be supposed to have had in view.

5. **SAME—Evidence of, Under the General Issue.**—The facts creating an estoppel can be proven under the general issue.

6. **SAME—No Mutuality, No Estoppel.**—G. as administrator of D. sued H. C. & F. upon a promissory note signed by them. H. was not served. The controversy involved the question as to whether or not an account held by H. against D. to an amount equal to the balance on the note, was a good defense in connection with the evidence that D. during his lifetime had declared that he would not pay the account held by H. against him as long as the note he held with H.'s name on it remained unpaid; that if H. sued on the account he would set off the note against it. *It was held* that the alleged defense did not operate as an estoppel *in pais*, there being no mutuality between the parties.

Memorandum.—Assumpsit. Appeal from the Circuit Court of Williamson County; the Hon. OLIVER A. HARKER, Judge, presiding. Heard in this court at the February term, 1894, and affirmed. Opinion filed June 23, 1894.

The opinion states the case.

CLEMENS & WARDER, attorneys for appellants.

DUNCAN & RHEA, attorneys for appellee.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The facts in this case and the issue therein are succinctly stated by appellants' counsel as follows:

"This was an action in the Circuit Court brought by the appellees in form of assumpsit, upon a note given to the decedent, Thomas Davis, for the sum of \$923.45, of date November 3, 1884, due one day after date and signed by Z. Hudgens (by M. C. Campbell) and M. C. Campbell and O. S. Tippy, the defendants Campbell and Tippy being the only parties served as defendants, with process.

There were credits on the note to the amount of \$675.

The controversy involves the question whether or not an account held by Z. Hudgens against Thomas Davis to an amount equal to the balance on the note, was a good defense in connection with the evidence that Thomas Davis during his lifetime had declared that he would not pay the account held by Hudgens against him, as long as the note he held with Hudgens' name on it remained unpaid; that if Hudgens sued on the account he would set off the note against it."

The plea of general issue was the only one filed. It is conceded the defense interposed is not in the nature of a set-off, nor is it contended the evidence shows an agreement that one claim should pay or satisfy the other. The court instructed the jury on the theory of such an agreement and that unless they believed from the evidence there was an agreement to that effect, they should find for the plaintiff. The appellants claim this was an erroneous theory in view of the facts. They contend the note was a joint and several contract, and therefore Davis, the payee, could sue either or all of those who signed it. He could, likewise, use it as against either one by way of set-off, if either one should sue him. It is said, "This was an election the payee was privileged to make. It therefore becomes important to consider whether, when the payee makes an election as to how he proposes to apply his demand, and notifies the party to be affected, he is not bound

by such election." It is further said, "This defense is not so much a set-off in its present shape, but operates as an estoppel *in pais*," and that Hudgens had a right to rely on his account being credited on the note now sued on. The doctrine of equitable estoppel is based on the "ground of promoting the justice and equity of the individual case, by preventing the party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth. Herman on Estoppels, Vol. 2, Secs. 741-4. Counsel earnestly insists this doctrine applies to this case. An estoppel *in pais* must operate on both parties. Mutuality is essential. *Dinet v. Eilert*, 9 Ill. App. 644. "The doctrine of estoppel *in pais*, or equitable estoppels, is based upon a fraudulent purpose and a fraudulent result. If, therefore, the element of fraud is wanting, there is no estoppel, as, if both parties were equally cognizant of the facts, and the declaration or silence of one party produced no change in the conduct of the other, he acting solely on his own judgment." *Davidson v. Young et al.*, 38 Ill. 152; *Dulargue v. Cress*, 71 Ill. 380. There must be fraud and injury to constitute an estoppel *in pais*. *Wilson v. Roots*, 119 Ill. 397. The facts show that Davis refused to pay Hudgens' account while Hudgens refused to pay the note Davis held against him, and that if Hudgens sued his account, Davis would counter in the same suit, with his note. That is all there is of it. Hudgens had the right to sue his account at any time. He was not estopped from doing so, and therefore it follows that Davis was not. There must be mutuality in estoppel. There was not the semblance of fraud in Davis' declaration, as it was but the assertion of a legal right, and therefore the essential element of an equitable estoppel is wanting.

The fact that Hudgens did not bring suit on his account is not material. His failure to do so was a matter of choice and not of estoppel. Davis' proposition was equivalent to an offer to set one claim off against the other, to the extent of the respective claims, and then, if he owed anything as a

East St. Louis Connecting Ry. Co. v. Allen.

balance, as the evidence shows, he was ready and willing to pay it. Hudgens was not willing to do this, probably because he was only a surety on the note. The note was long past due. His liability was fixed, and as to Davis, he was a principal as to such liability; that is, he could sue him alone. Davis did not, by his declaration, estop himself from bringing suit on the note. The facts do not warrant the inference of any manifestation of intention in that regard, on his part. "Estoppels are founded on intention, and can not be extended to objects and purposes which the parties can not reasonably be supposed to have had in view." *Needles v. Hamfan*, 11 Ill. App. 304. He made no election. Davis' assertion of a purpose was, first, in the negative, that he would not pay the account while he had the note on Hudgens; second, conditional, that if Hudgens sued the account he would set off the note. We are unable to observe an element of estoppel in the facts of this case. Had there been an estoppel, the facts creating it could have been proven under the general issue. *Mann v. Oberne*, 15 Ill. App. 35. There being no error in the record, the judgment is affirmed.

East St. Louis Connecting Railway Company v. E. P. Allen.

1. PLEADING—*Special Pleas in Case*.—To a declaration in case, special pleas are not necessary, as all defenses may be made under the plea of not guilty.

2. EVIDENCE—*Declaration of Employes*.—In general, such declarations of employes are not competent unless made at the time of the accident and directly connected with the main facts.

3. SAME—*Declarations of Employes—Time When made*.—Declarations of employes are not admissible unless shown to be a part of the *res gestae* of the accident, and to have been made in the course of their duties. No inflexible rule can be formulated as to time when the declaration must be made to form a part of the *res gestae* and the authorities are quite conflicting.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of St. Clair County; the Hon. ALONZO S. WILDERMAN, Judge,

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presiding. Heard in this court at the February term, 1894, and affirmed. Opinion filed June 23, 1894.

STATEMENT OF THE CASE.

Appellee was traveling along the public highway in a wagon, accompanied by his wife and little child, when, in attempting to cross defendant's railway track at the public highway crossing, defendant's engine, managed and operated by its servants, ran into the wagon, overturned it, and appellee, his wife and child were thrown with great violence upon the ground and the wagon so broken up as to be almost worthless. Appellee and his wife were injured and his child was killed. This suit was brought to recover for his personal injuries and the damage to his wagon.

A verdict in his favor for \$200 damages was returned by the jury, and judgment for that amount and costs was entered against appellant, to reverse which it took this appeal.

The first declaration was filed April 1, 1892, against appellant, and was in trespass. On April 12, 1892, appellant filed the plea of general issue and four special pleas to this declaration. The first special plea sets up, that by reason of the careless, negligent and improper manner in which plaintiff drove and managed said carriage, the locomotive by accident, and without fault of defendant, was driven upon and against the carriage, and thereby plaintiff sustained the injuries mentioned. The second special plea avers the place of accident was not a public highway crossing over any railroad of defendant. The third special plea avers defendant did not own, or operate the railroad mentioned in the declaration, and the fourth special plea avers defendant had upon said locomotive a bell, of at least thirty pounds weight, which was rung continuously from a point eighty rods from crossing until it reached the crossing. Leave was granted plaintiff to amend his declaration, and on June 22, 1893, the amended declaration in case was filed without objection, making appellant and two other railway companies defendants, and it consisted of seven counts.

The negligence alleged therein, is, in substance, obstructing the view of plaintiff by permitting cars to be on its side-track at the crossing, leaving less than half the width of the highway there open for travel, and in failing to give either of the signals required by the statute and ordinance of the city of East St. Louis, when its engine was approaching said crossing. On September 29, 1893, during the September term of said court, the pleas of appellant were extended to the amended declaration by order of the court, without objection. At the same term, on October 5th, plaintiff demurred to said special pleas on the ground that each amounted to the general issue. On the same date a motion on behalf of appellant was made for a judgment on special pleas, and denied by the court, and said demurrer was sustained to each. Appellant elected to stand by said pleas, and the court dismissed the suit as to the other defendants. The recital in the record there following is, "and issue being joined as to the defendant, the East St. Louis Connecting Railway Company, the court orders that a jury come."

CHARLES W. THOMAS, attorney for appellant.

WISE & McNULTY and GEO. C. REBHAN, attorneys for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

The reversal of this judgment is urged for three reasons, set up in appellant's printed argument. First, because the court erred in sustaining demurrer to special pleas. In support of this contention it is said, this was an action of trespass, and under the plea of the general issue in that form of action, appellant could not avail itself of the defenses set up in the special pleas, but must plead them specially. Hence, they did not amount to a plea of the general issue, and were not obnoxious to the demurrer for that cause. It appears by the amended declaration, filed by leave of the court and without objection, the form of action is changed to case, and the four pleas which had been filed by appellant to the first declaration were extended, that is,

made to apply to the amended declaration, also without objection. After this was done, they became pleas to the action on the case, and the defenses set up could be availed of under the plea of general issue in that form of action, and the demurrer was properly sustained for the cause assigned. It appears also, appellant introduced and had the benefit of all the evidence in its defense it could have had under the special pleas if issue had been joined thereon. The second reason assigned for reversal is, appellee was permitted to testify what defendant's engineer said to him, and Fellows, a witness for appellant, was permitted to testify what members of the engine crew said to him. The objection made to this testimony was, that it was hearsay and not part of the *res gestæ*. Appellee testified that before any of them had been taken out of the wreck, some of the train crew came to him; that he looked up and said to one of them he thought was the engineer: "Why, in the name of God, didn't you give some warning before you slaughter people in this way? Why didn't you ring the bell or blow the whistle?" and he replied, "That ain't no public crossing and we don't have to." Fellows, on cross-examination, testified: "I run up to the place of accident right after it occurred; it was, may be, ten minutes after they had got the boy out. Got there just as soon as they got the boy out." He was then asked if he did not hear the men, or some of them, say when he got there, that they were trying to get over the crossing ahead of the wagon? He answered, "They said they saw it from the west end of the string of cars," and continuing, testified Mr. Allen and Mrs. Allen were still lying under a stock car when he got there. He was then asked if he did not hear the fireman say at that time, that they were trying to get over the crossing ahead of the wagon they had seen from the west end of the string of cars? He answered "Yes." Witness, in response to a question asked by appellant's counsel, pointed out Sweeny, defendant's fireman, as the man.

In support of the contention that this testimony was hearsay and not a part of the *res gestæ*, and therefore im-

properly admitted, Vol. 21 Amer. and Eng. Enc. Law, p. 106, is cited. It is there said declarations of employes are not admissible unless shown to be a part of the *res gestae* of the accident, and to have been made in the course of their duties. No inflexible rule can be formulated as to the time when the declarations must be made to form a part of the *res gestae*. In general, such declarations are not competent unless made at the time of the accident, and directly connected with the main facts. Authorities cited in support of the text are quite conflicting. Many of them would support the contention of appellant, many others would sustain the ruling of the trial court in admitting the testimony objected to. Among the latter citations are: Keiser v. Chicago, etc. R. Co., 66 Mich. 390; Wormsdorf v. Detroit R. etc., 75 Mich. 472; Kaveter v. Manhattan R. Co., 59 Hun (N. Y.) 623; Hermes v. Chicago R. R. Co. (Wis. 1891), 50 N. W. Rep. 584. All the cases cited are cases decided by courts of other States, and counsel for appellant have referred us to but one Illinois case—Chicago, etc., R. R. Co. v. Becker, 128 Ill. 545. In that case the declarations held to be inadmissible were those made by the boy who was killed. They were made shortly after the accident, when the car he had been riding on was proceeding on its trip, and had gone some distance from the place of accident. They were not declarations made by employes, or in their presence. The case of Quincy Horse R. R. Co. v. Gneuse, 137 Ill. 269, seems to be in point, and under the facts proven in this case is against the theory of appellant. It was claimed in that case the court erred in allowing the witnesses to testify what the driver said after the car stopped. When the statement was made the car had just stopped, and the boy was still under the car. It was held that under such circumstances what was then said was admissible as part of the *res gestae*. In view of the authorities we have referred to and others we have examined, the testimony of appellee and Fellows was properly admitted. The declarations they testified to were made at the time of the accident and directly connected with the main facts.

The third reason assigned for reversal is the failure to prove by a preponderance of the evidence appellee was using due care, and that the engine bell was not ringing. Appellee testified he looked up and down the track and listened to discover if a train was approaching the crossing. His view of the track was obstructed by the cars on each side of the crossing, leaving a space of less than twenty feet of the highway, but if his evidence is true, he used all due care for his personal safety. He is contradicted on this point by Susan Lias. She said Allen was looking south, but his wife and the boy were facing the railroad and Mrs. Allen could have seen the engine. It is hardly probable this wife and mother saw the engine and permitted her husband to carelessly drive in front of it at the peril of his life, and the lives of herself and child. In addition to this and other improbabilities appearing in the testimony of this witness, she was contradicted on material points by other witnesses. The jury, in our judgment, had good reason for discrediting her testimony and believing that given by Allen, which established the fact he was using due care as averred.

The evidence as to the ringing of the bell was conflicting, as it is in all this class of cases, but it was the province of the jury to settle this conflict and give credit to the testimony of those witnesses they believed best entitled to credit. We have no doubt they performed this duty honestly, and decline to disturb their verdict. The judgment is affirmed.

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East St. Louis Connecting Railway Company v. Susan P. Allen.

1. INSTRUCTIONS—*Who Can Not Complain.*—A party who asks and causes the court to give instructions upon a certain theory, can not complain of instructions on the same theory when given at the instance of the other party.

2. SAME—*Errors Which Do Not Mislead.*—Where the court is satisfied that the jury have not been misled by an instruction to the prejudice of the opposite party, the judgment will not be reversed.

East St. Louis Connecting Ry. Co. v. Allen.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of St. Clair County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the February term, 1894, and affirmed. Opinion filed June 23, 1894.

Appellee's seventh instruction:

VII. The court further instructs you that if you believe from the evidence that any person who has testified before you as a witness in this case, has willfully sworn falsely as to any matter material to the issues in this case, then you are at liberty to disregard the evidence of such witness, except in so far as you may find it to be corroborated by other credible evidence given before you in this case.

CHARLES W. THOMAS, attorney for appellant.

GEO. C. REBHAN and WISE & McNULTY, attorneys for appellee.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

Appellee and her husband, while riding in a wagon, were injured by a collision with one of appellant's trains of cars.

The facts in this case are practically the same as in the case of appellant against E. P. Allen, the husband of appellee, decided at the present term. We deem it unnecessary to rehearse the evidence, but refer to the opinion in the case just mentioned for the statement of the facts. We think the evidence justifies the verdict in this case.

All questions relating to the pleadings, and to the admissibility of evidence as being part of the *res gestae*, have been considered in the E. P. Allen case, and there disposed of adversely to the contention of appellant's counsel. A repetition of our views upon the questions would answer no useful purpose.

The objection to appellee's first instruction is that she had nothing to do with the manner in which the team approached the crossing, for the reason that her husband was driving, and that it was error, therefore, to tell the jury that due care and caution on her part must be shown to authorize a recovery. Then why did counsel for appellant cause the same question to be submitted to the jury in appellant's fifth instruction, which told the jury

that it was incumbent on appellee to prove that she was in the exercise of reasonable care at the time of the injury and that appellant's servants were guilty of negligence? A party who asks, and causes the court to give, instructions upon a certain theory, can not complain of instructions on the same theory when given at the instance of the other party.

It is said that appellee's third instruction is erroneous as being a *resumé* of the whole case and as assuming that there was evidence on certain points, when there was no evidence on those points whatever. We think that there was evidence to sustain the hypothesis stated by the instruction, and that, if the jury found the facts to be as supposed in the instruction, appellee was entitled to a verdict.

The objection to appellee's fourth instruction is that it authorizes, among other elements of damages, the recovery of "necessary expenses in and about being treated for and cured of" the injuries sustained, "so far as all these things, if proved, may be shown by the evidence." It is said that there was no evidence to show what, if anything, was expended in the treatment of appellee. The clause as to expenses should have been omitted from the instruction; and yet we are satisfied that the jury were not misled thereby to the prejudice of appellant in the assessment of damages. The amount of the verdict was very moderate under the circumstances. Error which works no actual injury can not be used to procure the reversal of a judgment.

It is affirmed that appellee's seventh instruction should not have been given because it was directed at one of appellant's witnesses. The instruction mentions no name. There was evidence upon which to base it, and it contained all the elements which are necessary to authorize the rejection of the testimony of a witness who has willfully sworn falsely on a material point. The instruction was properly worded and qualified, and we do not believe that it was error to give it.

Upon careful consideration of the record, we see no reason why the court should have given any of appellant's refused instructions.

The judgment is affirmed.

East St. Louis Connecting Ry. Co. v. Gehring.

East St. Louis Connecting Railway Company v. Annie C. Gehring, Administratrix.

1. VERDICTS—*Irreconcilable with the Special Findings.*—Where the special findings are irreconcilable with the general verdict, under the provisions of the statute the verdict must yield.

Memorandum.—Action for damages; death from negligent act. Error to the Circuit Court of St. Clair County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the February term, 1894. Reversed and remanded. Opinion filed June 23, 1894.

The general verdict:

We, the jury, find the defendant guilty and assess the plaintiff's damages at \$2,000.

The special findings held irreconcilable with the general verdict:

1. Was the switch stand so situated with reference to the track that it would not have struck Gehring, unless he lowered his body so as to come within its range?

Answer. Yes.

2. Could Gehring, if he had exercised a small degree of care, have escaped the injury?

Answer. Yes; providing his attention was not attracted to foreman.

3. Was Gehring, at the time of the accident, hanging in the car stirrup in such a manner as to bring his rump or thigh in range of the switch stand?

Answer. Yes.

4. If Gehring had been standing up in the car stirrup would the switch stand have struck him?

Answer. No; but the foreman attracted his attention which caused him to lean out.

5. Did Gehring, prior to the accident, know the position of the switch stand with reference to the track?

Answer. Yes.

Defendant's motion for judgment non obstante veredicto:

And now comes the said defendant and moves the court to enter judgment in said cause for the defendant upon the special findings of fact made by the jury jointly and severally taken, and notwithstanding the general verdict.

STATEMENT OF THE CASE.

The plaintiff in error is operating a connecting railway on Front street in the city of East St. Louis. It has a switch at the terminus of each railroad that has its yards on this

street, and its business is to move freight cars from one road to another. It had such a switch at the connection with the Chicago & Alton Railroad, and many more at various distances apart up and down the street. At the switch mentioned there was a switch stand between its two main tracks about three feet high and about three feet from the nearest track. Freight cars, such as are handled by the plaintiff in error, are provided with ladders at the side over the trucks to enable men to climb on and off the cars, and there is a stirrup made of iron, below each ladder, so that the first rung of the ladder can be conveniently reached. Gehring had been working for plaintiff in error some time and was acquainted with the switch in question, and had frequently used it in the performance of his duties.

On the 4th day of October, 1892, a switching crew, of which he was one, had occasion to use this switch. There was a train of about eight freight cars. An employe named Slemens had charge of the switching crew so far as to direct the movements of the cars. A car had been thrown in onto a side track and the train moved slowly south in order to throw in another. Gehring took hold of the first or second rung of one of these ladders, put one foot in the first rung and one on the oil box, attached to the axle of the truck, and let his arm out at full length. While riding in this manner, he came to the switch stand and was scraped off the car. He fell between the tracks and while endeavoring to rise he stumbled and fell under the car and was killed.

CHARLES W. THOMAS, attorney for plaintiff in error.

BRIEF OF DEFENDANT IN ERROR, B. H. CANBY AND M. D. BAKER, ATTORNEYS.

Defendant in error contended that but one of the interrogations calls for a finding upon an ultimate fact, and that is No. 2. All of the others involve mere evidentiary facts, which are in no way controlling, and should not have been given. The answer to No. 2 is: Gehring could have

escaped injury, "providing his attention was not attracted to foreman." That is to say, if the circumstances surrounding him had been other and different from what they were, he might have escaped injury by the exercise of a small degree of care. This may all be conceded without in any way militating against the general verdict, finding from the circumstances as they actually existed, he was in the exercise of due care. *C. & N. W. Ry. v. Dunelvey*, 129 Ill. 132, *Ibid.* 540; *Treffers v. O. & M. Ry.*, 36 Ill. App. 93.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This suit was brought by Annie C. Gehring, administratrix of the estate of William Gehring, deceased, to recover damages under the statute. The negligence charged is that defendant negligently located and maintained a switch stand so close to one of its tracks as to endanger the lives and limbs of its servants operating trains; that deceased while on the side of a car which was being moved over defendant's track, and in discharge of his duty as switchman in defendant's service, and exercising due care for his own safety, was knocked off of said car by said switch stand to and upon the track, and run over by the moving cars and killed; that he left him surviving Annie Gehring, his widow, who by reason of his death has been and is deprived of her means of support. The jury found defendant guilty and assessed the damages at \$2,000, and judgment was entered against defendant for that amount and costs, to reverse which defendant sued out this writ of error. The special findings are irreconcilable with the general verdict, and under the provisions of the statute the latter must yield and should have been set aside.

Sess. Laws, 1887, p. 251, provides: "When the special finding of fact is inconsistent with the general verdict, the former shall control the latter and the court may enter judgment accordingly." As the case may be tried by another jury we refrain from commenting upon the evidence except to say, that under the facts proven, it is a close question whether or not a right to recover was established, and the jury should have been accurately instructed. But one in-

struction was given on behalf of plaintiff below, and that called for the finding of a verdict in her favor. By it the jury were informed that a railroad company is bound to exercise reasonable care to furnish safe machinery, road-bed, track and structures connected therewith, and that if they believed from the evidence the switch stand in question was constructed and used by defendant and was an unsafe and dangerous structure, and that defendant had notice thereof before the injury, or might have had such notice by the exercise of ordinary care, and negligently failed to make it reasonably safe, and that by reason thereof, deceased, without notice of its unsafe and dangerous character, while in the discharge of his duty, with due care and caution, was without fault, then and there killed, as alleged in the declaration, and that his widow and next of kin have thereby sustained pecuniary loss in their means of support, then the jury will find for the plaintiff. This instruction was erroneous, and not pertinent to the issue. The negligence averred is not that the switch stand was an unsafe and dangerous structure, but that it was located too close to defendant's track. Under the rule that pleadings must be given the construction most unfavorable to the party pleading, this averment must be held to admit the switch stand was not an unsafe and dangerous structure, and that fact is not in issue, nor a matter submitted to the jury by the pleadings, and notice or want of notice as to that fact, would be wholly immaterial. For the errors mentioned the judgment is reversed.

**Eli Oppenheimer & Co. et al. v. H. Giershofer & Co.
et al.**

1. JUDGMENTS—*By Confession—Proof of Execution of the Power.*—Proof of the execution of a power of attorney by the certificate of a notary public, who certifies that the person executing the power, who is personally known to him to be the same person whose name is signed to the power of attorney, appeared before him and acknowledged the

Oppenheimer & Co. v. Giershofer & Co.

execution thereof as his free and voluntary act, is not sufficient upon which to enter a judgment by confession. It has no probative force or effect, to establish the fact that the maker executed the power.

2. NOTARY PUBLIC—*Power to Take Acknowledgments.*—The authority given a notary public to take acknowledgments and certify thereto, relates wholly to real estate and is conferred by Sec. 20, Ch. 30, R. S.

3. JUDGMENTS IN VACATION—*Proof of the Execution of the Power.*—Without proof of the execution of the power of attorney attached to a judgment note, the clerk of the court acquires no jurisdiction of the person of the debtor, and the judgment entered upon it is void.

4. JUDGMENTS—*Entered Without Jurisdiction--Collateral Attack.*—A creditor of a debtor against whom the clerk of a court of record entered a judgment without acquiring jurisdiction by proper proof of the execution of the power is not restricted to the remedy by motion to vacate such judgment, but may, in a collateral proceeding, contest its validity.

5. CONFESSION OF JUDGMENT—*Before the Clerk by the Debtor in Prison.*—Under Sec. 65 of the Practice Act, any person, for a debt *bona fide* due, may, either in term time or in vacation, confess judgment by himself in person or by attorney duly authorized.

Memorandum.—Proceedings to distribute the proceeds of execution sales. Appeal from the Circuit Court of Massac County; the Hon. ALONZO K. VICKERS, Judge, presiding. Heard in this court at the February term, 1894. Reversed and remanded. Opinion filed June 23, 1894.

STATEMENT OF THE CASE.

The sheriff of Massac county levied upon and sold a stock of goods as the property of Jack Ringold, for the sum of \$3,375, under and by virtue of certain execution and attachment writs, issued in favor of creditors of Ringold, who had obtained judgments against him aggregating over \$5,000. Two of these judgments were entered in vacation, by confession, by the circuit clerk of Massac county; one in favor of Henry Giershofer & Co., for \$1,196.75, and the other in favor of H. Ringold for \$1,061.36 and \$50 attorney fee.

The validity of each of these two judgments was denied by the other judgment creditors, and the sheriff, following the suggestion of the Supreme Court in *Chittenden v. Rogers*, 42 Ill. 96, brought the money derived from said sale into the court below, together with his petition asking for an order of distribution. Thereupon all the creditors entered

their appearance and agreed to submit to the court for its decision, the question whether or not the two judgments by confession were valid. These judgments if valid are prior to any of the other judgments, and the court below found them to be valid and ordered distribution of the funds brought into court by the sheriff, to be made accordingly.

APPELLANTS' BRIEF, COURTNEY & HELM, ATTORNEYS.

The clerk of a court of record entering up a confession of judgment in vacation, acts in a ministerial capacity only, and no presumptions whatever are made in favor of the judgment. *Tucker v. Gill*, 61 Ill. 241; *Iglehart v. Insurance Co.*, 35 Ill. 516; *Martin v. Judd*, 60 Ill. 83; *Campbell v. Goddard*, 117 Ill. 252.

A judgment entered in vacation, where no affidavit is filed proving execution of warrant of attorney, is void. *Gardiner v. Bunn*, 132 Ill. 403; *Bunn v. Gardiner*, 18 Brad. 94; *Anderson v. Field*, 6 Brad. 308; *Joliet Light Co. v. Ingalls*, 23 Ill. App. 45.

An affidavit proving the execution of the power of attorney was essential at common law. *Petersdorff's Abridgment*, Vol. 15, 274; *Sellon's Practice*, Vol. 1, 381, 2 B. & C., 555, 2 B. & P., 85.

A certificate of a notary public is not evidence of any fact unless made so by statute. *Wharton on Evidence*, Vol. 1, Sec. 120; *Kyle v. Town of Logan*, 87 Ill. 64; *Philips v. Webster*, 85 Ill. 146.

APPELLEES' BRIEF, J. F. MCCARTNEY AND L. P. OAKES,
ATTORNEYS.

The court acquired jurisdiction of Jacob Ringold by the filing of a warrant of attorney duly executed by him.

It has been repeatedly held that in such cases four things are required: a declaration, warrant of attorney, proof of its execution and plea of confession. *Gardiner v. Bunn*, 132 Ill. 407; *Roundy v. Hunt*, 24 Ill. 598; *Tucker v. Gill*, 61 Ill. 241.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

The judgment by confession in favor of Henry Giershofer & Co., for \$1,196.75, was entered without other proof of the execution of the power of attorney than the certificate of J. F. McCartney, notary public, that Jacob Ringold, personally known to him to be the same person whose name is signed to the power of attorney, appeared before him and acknowledged the execution thereof as his free and voluntary act. The authority given a notary public to take acknowledgments and certify thereto, relates wholly to real estate and is conferred by Sec. 20, page 580, Starr & Curtis' Rev. Stat. This section provides that deeds, mortgages, conveyances, releases, powers of attorney, or other writings of, or relating to the sale, conveyance or other disposition of real estate, or any interest therein, whereby the rights of any person may be affected in law or equity, may be acknowledged or proved before a notary public. It is manifest, therefore, that the certificate of the notary public attached to the power of attorney presented to the clerk and not relating to the sale, conveyance or disposition of real estate has no probative force or effect to establish the fact that Ringold executed said power. The certificate of any private individual might just as fairly be held to be competent evidence proving such fact. *Kyle v. Town of Logan*, 87 Ill. 64. Certificates of this character, even if false, would subject the notary public who executed and attested the same to no penalty, either under Sec. 208 or Sec. 123, Chap. 38, Starr & Curtis' Rev. Stat.—the only sections of our criminal code providing for the punishment of such officers for malfeasance, which of itself would be a sufficient reason why such officers should not be permitted to execute and attest a certificate not authorized by law, and which if admitted as competent evidence, might injuriously affect the rights of litigants.

Without proof of the execution of the power of attorney, the clerk acquired no jurisdiction of the person of the debtor and said judgment entered in favor of Henry Giershofer & Co. was invalid. *Bunn v. Gardiner*, 18 Brad. 94;

Gardiner v. Bunn, 132 Ill. 403. And we understand the ruling in the latter case to be that creditors of a debtor against whom the clerk entered a judgment without acquiring such jurisdiction, are not restricted to the remedy by motion to vacate such judgment, but may appear in a proceeding like this and contest its validity. The Circuit Court erred in finding said judgment to be valid, and having priority over the judgments of appellants, and in ordering it should be first paid, out of the moneys brought into court by the sheriff.

The judgment in favor of H. Ringold is for \$1,061.35 damages and \$50 attorney fee. It was confessed by Jacob Ringold in person, before the clerk in vacation, upon a promissory note. The validity of this judgment is denied upon the ground there is no evidence by affidavit or otherwise, that the note was executed by said Jacob Ringold, or that it was *bona fide* due; no evidence of the execution of the cognovit and "no evidence that the person is the same he represents himself to be." Section 65 of the Practice Act provides that any person for a debt *bona fide* due, may confess judgment by himself or attorney, duly authorized, either in term time or vacation. The record, introduced in evidence, shows a declaration in assumpsit, filed by the clerk October 8, 1890—H. Ringold, plaintiff, against Jacob Ringold, defendant—counting on a promissory note executed by the latter for \$1,000, dated January 24, 1891, payable twelve months after date to the order of H. Ringold, for value received, and if not paid at maturity, eight per cent interest to be paid thereafter, and a reasonable attorney's fee for the collection of the note by suit or otherwise, which shall be deemed due and payable on default in payment of the principal when due, and may be entered up as a part of any judgment entered on the note. This note was filed by the clerk on the same date as the declaration.

The power of attorney to confess judgment on this note was given. The pleas of confession and certificate of clerk as shown by said record were also filed by the clerk on the same date as the note and declaration. By the plea it is

averred Jacob Ringold, as defendant, in proper person, appears, waives service of process, and confesses judgment for \$1,061.35 damages and \$50 as reasonable attorney's fee, and consents the same may be now entered in vacation in said Circuit Court, and consents to immediate execution being issued.

The certificate of the clerk sets out that Elijah P. Curtis, clerk of the Circuit Court in Massac County, Illinois, doth certify that Jacob Ringold, personally known to him to be the same person whose name is signed to the plea, appeared before him on that day in person and acknowledged the execution and delivery thereof, whereby he confessed judgment in vacation as his free and voluntary act, and thereby confesses judgment in favor of plaintiff, H. Ringold, for the full amount of the sum named in the cognovit and all costs. This certificate was signed and sealed by said clerk. In connection with the above the following judgment was shown by said record: "And judgment is hereby entered and recorded in favor of H. Ringold and against Jacob Ringold, for the aforesaid sum of one thousand and sixty-one dollars and thirty-five cents (\$1,061.35) as his damages, and also for the sum of fifty dollars (\$50) as attorney's fees, and all costs of this proceeding and judgment is entered in accordance with the statute as made and provided, and execution to be issued as provided by law. This 8th October, A. D. 1892, Elijah P. Curtis, clerk of the Circuit Court of Massac County, Illinois."

Sec. 3, Chap. 98, Rev. Stat., provides, that all promissory notes made by any person, whereby such person promises to pay any sum of money, shall be taken to be due and payable, and the sum of money therein mentioned shall by virtue thereof be due and payable as therein expressed. Sec. 34, Practice Act, provides that no person shall be permitted to deny on trial the execution of any instrument in writing, upon which action may have been brought, unless the person so denying the same shall, if defendant, verify his plea by affidavit. See also Joliet Elec. Light Co. v. Ingalls, 23 Ill. App. 45, where it is held that a promissory note evi-

dences indebtedness of maker to payee. The note sued on was filed with the clerk; it purported to have been given by Jacob Ringold for value. By its terms it had become due before said judgment was entered, and the plea of confession also filed with the clerk purported to be the plea of Jacob Ringold, the defendant, who appeared in person and delivered the same to be filed. But one person was named as defendant in said declaration, and he was designated therein by that name, as the maker of said note.

These facts appear in the record and furnished *prima facie* evidence to the clerk that the note sued on was executed by said Jacob Ringold; that it was for a debt *bona fide* due plaintiff; that he was the person who signed and delivered the cognovit, and was the real defendant named in the declaration. No affidavit was required to further establish these facts or to give the clerk jurisdiction to enter the judgment. If, as suggested by counsel for appellants, the note was a fraud, given without consideration, and the judgment therefore invalid, nothing prevented the introduction of evidence in the court below to prove such was the real fact, and thereby rebut the *prima facie* case made by the record.

We have not adverted to the allowance of attorney's fee, as no point is made as to that. Nor have we discussed the question of verifying a power of attorney by affidavit so far as this H. Ringold judgment is concerned; it was confessed in person by the debtor.

For the error assigned judgment is reversed and cause demanded.

Swift and Company v. John Raleigh.

1. PLEADINGS—*The Object Defined*.—The object of pleading is to apprise the opposite party of the charge against him, or of the defense to be interposed, so that due preparation for trial may be made, and not to furnish a sword for defeating a good case on technical and fanciful distinctions, which in no manner interfere with the proper decision of the case on its merits.

2. VARIANCE—*In Actions for Negligence*.—In actions for personal

Swift & Co. v. Raleigh.

injuries it is the duty of the court to confine the jury to the negligence alleged as the ground of recovery, and not to leave them unbridled, to render a verdict upon some other ground, simply because the work is hazardous in general.

3. RULES OF COURT—*Must be Incorporated in the Bill of Exceptions.*—Where an instruction is refused because it was not presented to the court before the commencement of the closing argument, as required by the rules, and it is designed to assign such refusal for error, the rule and the refusal must be made to appear by a bill of exceptions. A mere statement on the margin of the instruction, "refused, because not offered," is not sufficient.

4. CERTAINTY—*Reasonably Certain—Probable.*—It is error to refuse an instruction that damages can not be allowed for permanent injuries, unless it is reasonably certain that permanent injuries have been received. To say "reasonably certain" is practically the same as to say "probable."

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of St. Clair County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the February term, 1894. Reversed and remanded. Opinion filed June 23, 1894.

POLLARD & WERNER, attorneys for appellant.

JESSE M. FREELS and WM. WINKELMAN, attorneys for appellee.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

On February 6, 1893, appellant was engaged in remodeling a packing-house in East St. Louis. Large girders, about sixteen feet apart, ran from north to south across a room which was ninety-six feet wide by one-hundred and twenty-eight feet long. Beneath, and at right angles to the girders, were joists, or hog-runs, which were sixteen feet in length and two and three-quarters inches in thickness, and weighed about two hundred pounds each. Iron bolts were fastened to the girders and passed through the ends of the joists, which were thus suspended beneath the girders and were held in place by nuts on the ends of the bolts.

Appellants employed workmen to take down the joists. Patrick O'Hara, as the representative of appellant, had

charge of the men and the work. The workmen were divided into three parties, one to remove the nuts from the bolts, another to knock the joists from the bolts, and the third to receive the joists and to carry them away. The joists were about eight feet above the floor of the room.

During the early part of the forenoon the method of work was, for the first party of workmen to loosen the nuts, leaving them attached by one or two threads only, and then, when a particular joist was to be taken down, for the workmen of the third party to remove the nuts entirely and to receive the joists which were knocked down by the workmen of the second party who were stationed on the girders.

While the nuts were attached to the bolts by one or two threads, there was no danger of injury to the workmen by the falling of the joists, and the workmen passed from one girder to another by walking on the joists. In fact there is evidence to show that O'Hara sanctioned, if he did not direct, the use of the joists for this purpose. When the nuts were wholly removed, however, some of the joists would fall with a slight blow, or with the weight of a man, and it was unsafe for the workmen to use this means of passing from one girder to another. Appellee was aware of this fact, as he admits in his testimony.

During the forenoon, and after the work had been in progress for some time, O'Hara ordered the workmen to remove the nuts entirely in the first instance. This command was evidently given for the purpose of saving time.

Appellee swears that he did not hear the foreman's order and insists that it was the foreman's duty to give him notice of this important change in the method of work. O'Hara swears that the order was given in a loud tone of voice, so that all the workmen could hear. Others who were at work near appellee heard the command. The evidence tends to show that appellee must have known of the change. The fact that the workmen below him were no longer required to finish the removal of the nuts must have been noticed even by an ordinary observer of what was going on.

About half an hour after work had been resumed in the afternoon, the workmen were commanded by the foreman to take down another section of joists. Appellee undertook to walk on two joists to the next girder, when the joist on which his right foot rested gave way, and he fell with the joist to the floor.

He was injured and sued appellant for damages. He recovered a judgment in the Circuit Court for \$1,500 and the case is before this court on appeal from that judgment.

Counsel for appellant have argued at length the question of variance between the declaration and the evidence. If there is such a variance it is exceedingly technical. We would disturb the verdict very reluctantly on that ground. The object of pleading is to apprise the opposite party of the charge against him, or of the defense interposed, so that due preparation for trial may be made, and not to furnish a sword for defeating a good case on technical and fanciful distinctions, which in no manner interfere with the proper decision of the case on its merits. The most that can be said is that we have here a defective statement of a good cause of action. But the objection to the declaration can be removed by amendment before another trial, and with this suggestion we pass to the consideration of a more serious question.

It was a close and critical question under the evidence whether the change in the method of work was made without the knowledge of appellee, derived either from actual notice or observation. There were other hazards in the prosecution of this work than that arising from the change under discussion, and these hazards were open and known, and were voluntarily assumed by the workmen, so that no recovery for injuries resulting therefrom could be sustained. Hence it was the duty of the court to confine the jury to the negligence which has been mentioned as being the only ground of recovery, and not to leave them, unbridled and unconfined, to render a verdict upon some other ground simply because the work was hazardous in general.

The rule thus laid down was violated by the following instruction given at the request of appellee:

“The court instructs the jury that the master is bound to use ordinary care to provide machinery and appliances reasonably safe and suitable for carrying on the business in which the servant is engaged, and a reasonably safe place for him to work in, while so engaged in his service. And if the jury believe from the evidence that the defendant on the 6th day of February, 1893, was possessed of the packing-house in question, and then had the plaintiff and other servants engaged in remodeling and repairing the same, as alleged in the declaration, and that the defendant failed to exercise ordinary care to furnish the plaintiff with a reasonably safe place to work in, while so engaged in its said work, and that the place so furnished to plaintiff was dangerous, and that the plaintiff while in the discharge of his duty with due and ordinary care for his personal safety, and to prevent injury, and without notice of such danger, was in consequence of said failure and negligence of the defendant, then and there injured, then the jury will find for the plaintiff, and assess his damages at such sum as they believe from the evidence to be just compensation for the injury so sustained, not, however, to exceed the amount sued for.”

The negligence on the part of appellee, which is made the basis of recovery under this instruction, is very general indeed, that is to say, that appellant did not furnish appellee a reasonably safe place in which to work, and that the place so furnished was dangerous. The generality of this language allows the imagination too much liberty for the proper adjustment of the differences between the parties. No other instruction was given for appellee on this point, and the limitations imposed by instructions given for appellant are not such as to cure the error under consideration.

The only rule as to the measure of damages given to the jury is to be found in the latter part of the instruction quoted. Appellant requested the court to instruct the jury that damages could not be allowed for permanent injuries, unless it was reasonably certain that permanent injuries had been received. To say “reasonably certain” is practically the same as to say “probable.”

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The instruction was refused. We think it should have been given. But it is said that the instruction was not presented to the court within the time required by a certain rule of court then in force. Even if this rule, which requires instructions to be presented to the court before the commencement of the closing argument, were properly before us, there is nothing in the record to show when this instruction was presented, or that it was refused because not presented within the time prescribed. The record states explicitly that appellant asked the court to give the instruction, and that the court refused to give it. An exception was taken to this ruling. If the refusal to give the instruction was for the reason stated, appellee should have made that fact to appear in the bill of exceptions. The mere statement on the margin of the instruction, "refused because not offered" is not sufficient.

The record shows that the instruction was offered, and this marginal statement shows no more than that the instruction was refused. *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573.

For the errors above indicated, the judgment is reversed and the cause is remanded.

Sarah Ellen Bates et al. v. Lucinda Park.

1. **QUESTIONS OF FACT**—*Settled by a Decree.*—Where a controversy involves principally questions of fact and such questions have been properly settled by a decree, this court will not disturb the finding.

Memorandum.—Bill for foreclosure. Error to the Circuit Court of Richland County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the February term, 1894, and affirmed. Opinion filed June 23, 1894.

The opinion of the court states the case.

JOHN LYNCH, JR., attorney for plaintiffs in error.

R. B. WITCHER, attorney for defendant in error.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

This was a suit to foreclose a mortgage, dated May 10, 1889, and recorded three days afterward, and made to secure the payment of one promissory note of even date with the mortgage, for the sum of \$200, due two years after date, with interest thereon at the rate of eight per cent per annum. The note and mortgage were executed by Sarah Ellen Bates and her husband, David L. Bates, to Jasper I. Montray, and were assigned by him to McCauley & Montray on July 25, 1889, and by them to Lucinda Park, defendant in error, on December 31, 1889. The note and mortgage were in evidence on the hearing, and the execution of both of them by the Bateses was sufficiently proved.

The tract of land, consisting of forty acres, which was covered by the mortgage, was sold and conveyed on February 14, 1891, by Sarah Ellen Bates and her husband to Jane W. Morris, one of the plaintiffs in error. The land was conveyed, subject to the mortgage, for a consideration of \$25, and whatever might be realized under a contemporaneous written agreement, whereby Jane W. Morris was authorized to resist the foreclosure of said mortgage on the ground of fraud, and was obligated to give Sarah Ellen Bates one half of the net proceeds of any reduction which might be obtained by resisting, defending or compromising.

There is no doubt that the note and mortgage were bought by Lucinda Park in good faith, and for a valuable consideration, and without notice of any defense thereto. It is contended now, however, that the note and mortgage were made without consideration, and that the execution of these instruments was procured by threats and fraudulent representations on the part of Jasper I. Montray.

The charge of fraud and threats rests solely on the testimony of the Bateses. It is claimed that a man named Robert Simpson, the father of Mrs. Bates, by some sort of adoption, legal or otherwise, gave to Mrs. Bates a short time before his death, \$970 in cash, to be divided between herself and her sister, Mary Winder, in case of Simpson's death. The

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money was buried in the ground until arrangements had been made by which Jasper I. Montray was to take and hold the money for them. Montray and his wife went after the money at night, and David L. Bates, by the light of a "lantern dimly burning," exhumed the precious deposit and confided it to the lawyer's keeping. Afterward, whenever the attorney was importuned for money, he displayed a copper cent, or gave some other evidence of his impecuniosity.

Finally he began to threaten the Bateses with the penitentiary. He said that it was necessary to cover up this money; that if the Simpsons found out what had been done, they would make trouble; that he was a lawyer and could get out of the difficulty, but that the Bateses were in danger of going to the penitentiary. Under such threats, it is said, the mortgage to Montray was made, to enable him to cover up the transaction and to keep the Bateses out of the penitentiary. As between the parties the mortgage was false and fraudulent, as the Bateses swear, and was to be delivered to them after the lapse of two or three weeks, and was not to be put on record under any circumstances. In this way the penitentiary was to be cheated of its due, and the wicked were to be allowed to run at large, waxing worse and worse and deceiving the unwary. This is a highly improbable story, to say the least, and the chancellor would have been justified in disbelieving it, even if Montray had not contradicted it. How would a note and mortgage for \$200, which were to be destroyed after a brief existence of two or three weeks, enable Montray to cover up the \$970, which had been transferred to his custody from a hole in the ground? Would the statute of limitations bar the curiosity and inquiries of the neighbors after the lapse of so brief a period?

The manner in which the Bateses testify discredits their testimony. Mary Ellen Bates swears that she has no recollection of signing the note, and David L. Bates swears positively that he did not sign it. On this subject, the latter says at one time, "I will swear it on a pile of bibles as high as

a man can stand," and at another time, "I will swear that forty times more." When this witness was asked if he and his wife were not living separate and apart at the time of her suit against Montray, he prevaricated shamefully, and then, after an adjournment for dinner, took the witness stand and swore that he and his wife were living separate and apart at that time, and explained his prevarication in the following language: "I saw very plainly what he (defendant in error's attorney) wanted when he began to ask me—what he was driving at—but I had not thought about what to say." This amounted to a confession that he was endeavoring to swear according to his interests, and that he would not commit himself before ascertaining what his interests were. These are but a few of the facts connected with this case which show the unreliability of the testimony of David L. Bates. Sarah Ellen Bates gave her testimony with less recklessness than did her husband. But the story was the same and its inherent improbability was sufficient to condemn it and to justify the court in rejecting it.

The evidence shows a full settlement between Mary Ellen Bates and Jasper I. Montray through a suit brought by the former against the latter, in which she recovered and collected a judgment for \$96.

The evidence further shows that at the time when the note and mortgage were made, certain lots in the village of Dundas, called the Dundas property, were conveyed by McCauley & Montray to Mary Ellen Bates and her sister for the consideration of \$300, which was made up of the note and mortgage for \$200, and \$100 in notes of the Simpson estate. Mrs. Bates occupied the Dundas property, and sold it, and received the proceeds of the sale, and is therefore estopped to set up fraud or to dispute the consideration of the note and mortgage. She seeks to avoid the effect of this estoppel by swearing that a prior deed had been made to her for the same property by Montray for \$850, which was paid by his retaining that amount out of the \$970 which had been put in his custody, and that he

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afterward got possession of that deed, and that therefore the property was hers without the second deed, which could not, under the circumstances, have been given for the mortgage, as claimed by Montray in his testimony. But the evidence does not support this proposition, which is incredible in itself, and the court was justified in regarding it as an idle tale.

The questions involved are principally questions of fact, and these have been settled, and properly settled, by a decree in favor of the defendant in error.

The decree is affirmed.

**Joseph B. Miller et al. v. The German Insurance Co.
of Freeport.**

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1. **INSURANCE—Change of Title—Death of Insured Avoids the Policy.**—Under an insurance policy containing a provision that in case of a change of title to the property insured or any part thereof, or any interest therein, without the consent of the company indorsed thereon, the policy should at once cease to be binding upon the company, *it was held* that the death of the insured effected such a change of title to the property, and operated to forfeit the policy.

Memorandum.—Action on a policy of insurance. Appeal from the Circuit Court of Hardin County: the Hon. ALONZO K. VICKERS, Judge, presiding. Heard in this court at the February term, 1894, and affirmed. Opinion filed June 23, 1894.

**APPELLANTS' BRIEF, MR. W. S. MORRIS AND L. F. PLATER,
ATTORNEYS.**

Appellants contended that where an insurance policy contains a clause inserted to defeat its operation in case of alienation or sale, the death of the assured intestate will not avoid it. *Burbank v. Rockingham M. F. I. Co.*, 24 N. Y. 558.

Alienation differs from descent in this, that alienation is effected by a voluntary act, while descent is the legal result

of the death of the owner, and is not changed by any previous act or violation of the owner. *Burbank v. Burlington M. F. I. Co.*, 24 N. H. 558.

Appellants also cited as sustaining the principle, the following cases: *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 553; *Ayers v. Hartford Ins. Co.*, 17 Iowa, 176; S. C., 21 Iowa 193; *Lane v. Maine Mut. Fire Ins. Co.*, 12 Me. 44.

Or where the property descends to heirs. *Burbank v. Rockingham Ins. Co.*, 4 Fost. (N. H.) 550; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. (Va.) 88; 7 English and American Encyclopædia of Law, 1029, note 2.

APPELLEE'S BRIEF, WHITNEL & GILLESPIE, ATTORNEYS.

Descent to heirs is a change of title to the property, and avoids policy. *Lappin v. Charter Oak Ins. Co.*, 58 Barb. (N. Y.) 325; *Hine v. Receiver of Homestead Fire Ins. Co.*, 13 Ins. Law Journal, 71; *Hine v. Receiver of Homestead Fire Ins. Co.*, 93 N. Y. 75; *Sherwood v. The Agricultural Ins. Co.*, 73 N. Y. 447; *Sherwood v. The Agricultural Ins. Co.*, 29 Am. Rep. 180; Wood on Insurance, Vol. 1, p. 712, Sec. 340; Wait's Actions and Defenses, Vol. 4, p. 53; *Wyman v. Wyman*, 26 N. Y. 253; *Quarrels v. Clayton Ins. Law Journal*, Oct. '89, p. 744; (a Tennessee opinion, Feb. 12, '89); 10 S. W. Rep. 505; Starr & Curtis' Statutes, Vol. 1, Chap. 38, p. 879.

Any material change in title, though not by alienation, will avoid insurance policy, which provides that any alteration or change in the title shall avoid it. *Barnes v. Union Mut. Fire Ins. Co.*, 51 Me. 110; *Barnes v. Union Mut. Fire Ins. Co.*, 81 Am. Dec. 562; *Edmunds v. Mutual Safety Fire Ins. Co.*, 79 Am. Dec. 746; *Morrison v. Tenn. Marine Ins. Co.*, 59 Am. Dec. 299 (note at bottom of p. 308 to the case last cited); *Dix et al. v. Mercantile Ins. Co.*, 22 Ill. 272.

There is a plain distinction between those clauses which prohibit an alienation, and those which forbid any change of title. *Oakes v. Manufacturers' Ins. Co.*, 131 Mass. 165; *Savage v. Howard Ins. Co.*, 52 N. Y. 502-6; see, also, 59 Am. Dec., note bottom of page 308.

The condition is plain and must be interpreted according to the intention of the parties, gathered from the language employed. *Dix et al. v. Mercantile Ins. Co.*, 22 Ill. 272; *Home M. F. Ins. Co. v. Hauslein*, 60 Ill. 521.

A contract of insurance is one of indemnity, is purely personal, and does not run with the thing insured. *Wood on Ins.*, Vol. 1, p. 695. Sec. 329; *Carpenter v. Providence, etc., Ins. Co.*, 16 Pet. (U. S.) 495; *Finney v. Bedford Com. Ins. Co.*, 8 Met. (Mass.) 348; *Arnold on Ins.*, Vol 1, p. 146 (note); *Phillips on Ins.*, Vol. 1, p. 219; *Duer on Ins.*, Vol. 2, Sec. 24.

Our courts have not condemned the condition in insurance contracts against "change of title or interest," etc., as odious, but to the contrary, have upheld such as reasonable and just. *Dix et al. v. Mercantile Ins. Co.*, 22 Ill. 272; *Commercial Union Ass. Co. v. Scammon*, 102 Ill. 46; *Milwaukee Mec. Mut. Ins. Co. v. Kitterlin*, 24 Ill. App. 158.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

This case is submitted to this court on the following agreed state of facts, made up from the record. The policy of fire insurance was issued to Alice A. Miller, January 31, 1890, who died on March 7, 1890, the owner of the property insured. The company "had no notice of her death, and did not consent to a change of title to the property, if there was a change of title, nor waive any conditions of the policy." The property was destroyed by fire on the 1st day of November, 1890. The insured left surviving, she having died intestate, her husband and three minor children, as her only heirs at law.

"It is further agreed that this case turns upon the construction of the fifth clause of the policy of insurance, set out in this record, which is in the following words and figures:

*V. When property insured by this policy or any part thereof shall be alienated, or shall in any manner become incumbered, or in case of a change of title to the property insured, or any part thereof, or of any interest therein, without the consent of the company indorsed thereon, * * * this policy shall at once cease to be binding upon this company.*

If the Appellate Court finds that the death of Alice Miller prior to the fire, worked such change of title to the property named in the policy as avoids legal liability of the defendant thereon, then this cause shall be affirmed. If it holds such death did not make such a change of title, then this cause shall be reversed and remanded."

As put by appellee's counsel, "there is but one question presented by this record and agreement, and that is, did the death of Alice A. Miller and the descent of the property to her heirs, work a change of title to the property within the meaning of the terms and conditions of the policy?" That a complete change of title was effected is unquestionable. The *quære* is, did the change of title, caused by the death of the owner, work a forfeiture of the policy within the meaning of the terms used? The language used that is immediately applicable to this question is set out in italics.

The death of the assured intestate did not operate as an "alienation" of the property insured. Usually that term applies to lands or some interest therein. 4 Kent, 441; 1 Washburn, 67; 2 Ibid. 251; Bouvier. In any event "by 'alienation' is meant, an act whereby one man transfers the property and possessions of land or other things to another." Boyd v. Cudderback, 31 Ill. 119. To alienate is to voluntarily part with the ownership by bargain and sale, or by gift or will. "Property not transferred or devised is not alienated according to the principle of the common law." Burbank, Adm., v. R. M. F. Ins. Co., 24 N. H. 550.

The term "change of title" is, of itself, a more comprehensive expression than the term "alienation." It includes all modes known to the law. The distinction between these expressions is noted in Sherwood v. Agricultural Ins. Co., 73 N. Y. 447, which is a case much like the one under consideration as to the terms of the policy and the other facts involved, and by a majority of the court is deemed to correctly lay down the law as applicable to the proper construction to be given to the provision of the policy in suit. It was there held that death effected a change of title to the property, which operated to forfeit the policy. The writer

of this opinion is inclined to the view that the words in the fifth clause, "without the consent of the company indorsed hereon," relate to and so qualify the phrase, "or in case of a change of title to the property insured," that "the change of title" contemplated by the contract was one of such a character, the company could indorse its consent thereto on the policy before the change occurred, and thereby preserve it in force without momentary lapse. This was not possible in case of change of title by death.

There is another view to take of this case.

The insured died about one month after the insurance was taken, and the personal property insured was burned nearly eight months thereafter. The contract of insurance does not insure the property of the insured and that of her heirs, executors, administrators and assigns. The language of the policy in this respect is, "The German Insurance Company, in consideration of the conditions, limitations and requirements of this policy, hereinafter mentioned, and of twenty-four dollars, does insure Alice A. Miller for one year * * * against loss or damage by fire." Herein this case differs from that of *Burbank v. R. M. F. Ins. Co.*, 24 N. H. 550, relied upon by appellant. In that case as here, it was contended by the company that death operated to defeat the policy. The court say: "It is also a pertinent inquiry, whether the provision in the policy insuring the assured, and his heirs, executors, administrators and assigns, would not be entirely nugatory if the death of the assured operates upon facts as an alienation of the property." It would appear, as suggested by the court, that such a clause would carry the insurance after the death of the assured for the benefit of heirs and legal representatives, as all policies should do, at least, for a specified time. It is, doubtless, generally supposed policies by their terms continue for the benefit of heirs and legal representatives. To so contract that the policy ceases to operate as an indemnity immediately upon the death of the insured, with the company retaining the premium paid for carrying the risk, would certainly be unjust and work a great hardship, if loss should occur

before there was opportunity given to renew the insurance after burying the dead.

Those insured evidently do not contemplate such results or such practice. Where the heirs are numerous and scattered, in many instances it would be very difficult to effect insurance, and would be attended with some delay, especially if there were minors. In the meantime, the interest of the heirs as well as creditors, as to many classes of property, would be greatly jeopardized.

In this case, however, the husband, the natural guardian of the heirs, survived, and should have known the terms of the policy. He had about eight months within which to renew the insurance with the company. Doubtless he supposed it continued, and therein a hardship may result in holding there can be no recovery. But as it is said in the Sherwood case, *supra*, "even if such hardship existed it could not govern the construction of the policy. The proper mode of guarding against it would be by a provision in the contract."

The contract of insurance in this case was personal to the insured and her only. It did not create an additional interest or right in the property itself, so as to annex a value thereto transferable therewith. Wood on Ins., Vol. 1, p. 695. In the case of *The Columbia Ins. Co. v. Lawrence*, 10 Peters (U. S.) 512, it is said: "These policies are not insurances of the specific things mentioned to be insured, nor do such insurances attach to the realty, or in any manner go with the same as incident by any conveyance or assignment; but they are only special agreements with the persons insured against such loss or damage as they may sustain." In *Carpenter v. The Prudence Ins. Co.*, 16 Peters (U. S.) 502, it is said: "The society are to make satisfaction in case of loss by fire. To whom and for what loss are they to make satisfaction? Why, to the person insured and for the loss he may have sustained; for it can not properly be called insuring the thing, for there is no possibility of doing it; and therefore must mean insuring the person from damage."

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There is a moral hazard in the insurance business. The character of the owner of the property is recognized as an element in taking risks. The appellee had the legal right to determine for whom it would take risks and likewise for whom it would maintain them. It did not contract to maintain the insurance for appellants. *Hine v. Woodworth*, 93 N. Y. 75. They have shown no right to maintain this action and therefore can not be permitted to recover the insurance provided for in the policy. *Dix v. Ins. Co.*, 22 Ill. 272. The judgment is affirmed.

**Millard F. Hoskinson and Laura E. Hoskinson, Im-
pleaded with Wm. S. Risley and Jas. P. McNair,
v. Isaac W. Jaquess, Guardian of
William H. Lamaster.**

1. **OFFICIAL MALFEASANCE—*Fraudulent Sales.***—A judge of a Probate Court rendered a decree for the sale of an infant's lands, and procured the same to be bid off at the sale in the name of his wife, for his use, for the sum of \$1,065. The same judge approved the sale of the land so made, and soon thereafter sold the land for a sum largely in excess of the amount bid at said sale. The sale and conveyances were held to be in fraud of the rights of the infant and were set aside, and the judge required to refund, with interest and costs, the amount which he received for the land.

Memorandum.—Bill for relief. Appeal from the Circuit Court of Wabash County; the Hon. CARROLL C. BOGGS, Judge, presiding. Heard in this court at the February term, 1894, and affirmed. Opinion filed June 23, 1894.

The opinion states the case.

E. B. GREEN and GEO. P. RAMSEY, attorneys for plaintiffs in error.

**BRIEF OF DEFENDANT IN ERROR, MUNDY & ORGAN,
ATTORNEYS.**

Defendants contended that the law will not allow a county judge to permit land of his wards to be sold, without the

bonds required before the sale of lands to pay debts is filed. Sec. 23, Starr & Curtis, Chap. 3; Young et al. v. Dowling, 15 Ill. 481.

Nor will the law permit a judge of the Probate Court to purchase at a sale ordered by himself, using his wife's name to do so; nor will a sale stand in law where it is shown that the probate judge procured the sale to be made in his wife's name and affirmed the sale as such judge, thus affirming a title in himself as her husband. A county judge can not buy at sale ordered by himself. West v. Waddell, 33 Ark. 575; Livingston v. Cochran, 33 Ark. 294; Grayson v. Waddell, 63 Mo. 523; Freeman on Void Judicial Sales, Sec. 33; Wilson v. Kellogg, 77 Ill. 47; Young et al. v. Dowling, 15 Ill. 481.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

On December 17, 1886, the land described in the bill hereinafter mentioned, was devised by Lou Ann White to her nephew, William H. Lamaster. James P. McNair was appointed executor of her will and gave bond as such December 29, 1886. On January 17, 1887, he inventoried said land at the value of \$2,100. On July 18, 1887, a decree was entered in the County Court of Wabash County, by Millard F. Hoskinson, judge thereof, for the sale of said land to pay debts. In accordance with this decree the sale thereof was made August 27, 1887, and four days thereafter the executor filed his report of sale, showing he had sold all of said land to Laura E. Hoskinson for \$1,025, and had executed and delivered to her a deed for the same. This report was approved and the sale thereby confirmed by said county judge on September 5, 1887, and on September 13, 1887, Laura E. Hoskinson and her husband, said county judge, sold and conveyed said land to W. S. Risley for \$2,490.

On October 31, 1893, Isaac W. Jaquess was duly appointed by said County Court, guardian for said William H. Lamaster, a minor, and on November 2, 1893, filed his bill as guardian against Millard F. Hoskinson, Laura E. Hoskinson, W. S. Risley and John P. McNair in the court below, to set

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aside both the executor's sale of his ward's land and the sale thereof to Risley, and praying that the purchase money from Risley received by Laura E. and Millard F. Hoskinson be held to belong to complainant with interest, and that they be ordered and decreed to pay the same to complainant; also praying for such other and further relief as to the court shall seem meet and just.

Answers by each defendant were filed, denying some and admitting the truth of other allegations of the bill. The cause was heard on the pleadings and proof, and the court entered a decree dismissing the bill as to defendants, Risley and McNair, and finding the land described in the bill was sold by virtue of said decretal order of the Wabash County Court; that Millard F. Hoskinson was then county judge thereof, and as such, granted the said decree of sale, and procured the said land to be bid off at said sale in the name of Laura E. Hoskinson, then his wife, for his use, for the sum of \$1,065; that said M. F. Hoskinson, as county judge, approved the sale of the land so made, and soon thereafter he and his said wife sold said land for, and received the sum of \$2,490, being \$1,465 in excess of the amount so bid at said sale. That said M. F. and Laura E. Hoskinson hold said excess in trust for said Wm. H. Lamaster, and decreed that they pay him said sum of \$1,465, with five per cent interest, amounting in all to \$1,901.50, and costs of suit, and that execution issue therefor. The evidence fully sustains the findings and decree. M. F. Hoskinson procured an attorney to bid off the land in his wife's name. Mahon, a witness, testified that before the sale, Hoskinson talked to him about giving him a present if he would not bid, and gave him \$50 afterward for not bidding and said he had made a good purchase and sale of the land. Mrs. Hoskinson had no money and her husband borrowed the money to pay the amount of the bid and, with his wife, gave a mortgage on the land to secure the loan. At the time of the sale this county judge knew by the inventory of record in his court this land was valued at \$2,100, and yet approved the sale thereof to his wife for less than half that amount, and in thirteen days thereafter joined with her in a deed

conveying said land to W. S. Risley for \$2,490, \$1,025 of which amount Risley agreed to pay to said mortgagee, and the balance Hoskinson took and kept for his own use, and gave his wife a deed to the premises occupied by them as a homestead, as she testified, in consideration of her consenting to his so appropriating such excess of \$1,465 to his own use.

It is quite evident that Hoskinson attempted to and intended to effect a fraudulent purpose. He procured the name of his wife to be used as a bidder to make it appear he had no interest in the purchase, with the design to get the land at a low and inadequate price and sell it at a profit, in fraud of the rights of the minor devisee to whom he stood *in loco parentis*. Such acts on the part of a county judge can not be tolerated. He had no right, either in his own name or in the name of his wife, to purchase the land sold by virtue of the decree entered by himself. It was his duty as the judge decreeing the sale, to preserve and protect the minor from fraud, unfairness and imposition; to prevent, and not to aid, in the sacrifice of his property. *Coffey v. Coffey*, 16 Ill. 141, and cases there cited.

Judge Hoskinson and Laura E. Hoskinson both participated in the illegal transaction, and shared the illegal gains, and, in our judgment, the decree of the Circuit Court was just, and properly required them to refund, with interest and costs, the amount which equitably belonged to said minor, and of which they had wrongfully and illegally despoiled him. The decree is affirmed.

George D. Barnard & Co., a Corporation, v. Edmund H. Babbitt.

1. STATUTE OF FRAUDS—*A Contract Not Within.*—The following contract, viz.:

“ST. LOUIS, Nov. 26th, 1888.

E. H. BABBITT, Esq., Dear Sir: We propose to make you an offer of \$1,650 for the first year and \$1,800 for the second, we to have the privilege

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of canceling the agreement at the end of the first year if we are not satisfied with your work. Respectfully,

G. D. BARNARD & Co.

Accepted. E. H. BABBITT.

GEO. D. BARNARD, Pt."

is not within the operation of the statute of frauds.

2. **CONTRACT FOR SERVICES—No Time Fixed.**—Where a person contracts to perform services, no time being fixed, the presumption is, he was to commence work at once or within a reasonable time after the expiration of the contract.

3. **PLEADING—Former Recovery in Bar—Burden of Proof.**—Where the defendant pleads a former recovery in bar, and the plaintiff in his replication seeks to avoid it by alleging that the recovery was a voluntary non-suit, concluding with a verification, the rejoinder concluding to the country, the burden of proving the matters in the replication is upon the plaintiff.

Memorandum.—Assumpsit upon a written contract. Appeal from the Circuit Court of St. Clair County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the February term, 1894. Reversed and remanded. Opinion filed June 23, 1894.

The opinion states the case.

CHARLES W. THOMAS, attorney for appellant.

TURNER & HOLDER and ORR, CHRISTIE & BRUCE, attorneys for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This was a suit brought by appellee against appellant to recover for services, under the following written contract:

"St. Louis, November 26, 1888.

E. H. BABBITT, Esq., Dear Sir: We propose to make you an offer of \$1,650, for the first year and \$1,800 for the second, we to have the privilege of canceling the agreement at the end of the first year, if we are not satisfied with your work.

Respectfully,

GEO. D. BARNARD & Co.

Accepted. E. H. BABBITT.

GEO. D. BARNARD, Pt."

In addition to the general issue, plea of the statute of frauds was filed, and replication that contract was executed in writing and signed by defendant; issue was joined; second plea of former recovery; replication that in the

trial of the said cause there was no judgment on the merits, because plaintiff before trial had, and before judgment rendered took a voluntary non-suit, concluding with a verification.

Rejoinder concluding to the country. An amended third plea was filed also, and replications and rejoinder, not necessary to set out, as there is no controversy in relation thereto. The admission of the contract in evidence and admitting the testimony of plaintiff in connection therewith was proper. When the contract is read by the light of the letter from defendant, received by plaintiff immediately preceding its execution, it seems to us quite clear that it was an agreement in writing, whereby plaintiff was employed to serve defendant in a certain department, at a salary of \$1,650 for the first year and \$1,800 for the second year, with the privilege to defendant to cancel agreement at the end of the first year if not satisfied with plaintiff's work. It was executed by plaintiff and defendant, and was not within the operation of the statute of frauds.

Furthermore, the objection that no time is fixed by the contract when plaintiff was to commence work is not tenable. No time being fixed, the presumption is he was to commence work at once, or within a reasonable time after the execution of the contract, and he did commence the next day thereafter, was not discharged at the end of the first year, and continued to work during a part of the second year, when he was discharged, as he says, without just cause. The judgment must be reversed, however, for a different reason. It is averred in the second special plea, that in a suit brought by plaintiff in a court of competent jurisdiction against defendant to recover upon the same contract, there was a former final adjudication of said cause of action against defendant, by the judgment of said court. This plea presented a full defense, but plaintiff, by his replication, not denying the averments of the plea, sought to avoid the defense by setting up new matter, viz., that said judgment was not upon the merits, and that before trial had, and before judgment in said cause, he took a voluntary non-

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suit. This replication concluded with a verification, and thereby plaintiff took the affirmative and assumed the burden of proving the averments of his replication inasmuch as the rejoinder traversed these averments, and concluded to the country. Plaintiff offered no evidence in support of his replication, and by the pleadings the defense set up in said plea was admitted, and could be avoided only by proof of the facts set up in the replication.

The court erred, therefore, in refusing to hold as the law the third proposition as requested by defendant. It was as follows: "The court is requested to hold that upon the pleadings and facts proved the plaintiff can not recover." The finding and judgment for appellee was error, and the judgment is reversed and cause remanded.

Hoover & Gamble v. Christian Doetsch.

1. SALES—*Warranty—Compliance with the Conditions.*—D. bought a harvesting machine upon a warranty that it was well built, of good material, and would do good work where any such machine could be successfully operated. It was provided that should the machine fail to work properly when started, due notice must be given to the agents, and time allowed to send a person to put it in order. If it was not then made to work well, it might be returned, and any payment that had been made before the trial should be refunded, or a perfect machine given in its place. *It was held* that an offer to return the machine was not sufficient even though the agent said he would not receive it. If the machine had been taken to the agent's place of business, and the agent had refused to receive it, then the purchaser would have been relieved from responsibility, and the vendor compelled to refund the payments received or furnish a perfect machine.

Memorandum.—Assumpsit on promissory notes. Appeal from the County Court of Jackson County; the Hon. W. W. BARR. Judge, presiding. Heard in this court at the February term, 1894. Reversed and remanded. Opinion filed June 23, 1894.

The opinion states the case.

THOMAS H. PHILLIPS, attorney for appellants; A. B. GARRETT, of counsel.

HILL & MARTIN, attorneys for appellee.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

This action was brought by appellants before a justice of the peace to recover from appellee the amount due on two promissory notes for \$75 and \$65 respectively, the said notes had been given for an Excelsior harvester, sold to appellee by appellants in June, 1887, through their agent, Chris. Hack. On the trial of the case in the County Court on appeal, judgment was rendered in favor of appellee. This judgment was afterward reversed by this court. The second trial in the County Court resulted in another judgment for appellee, and the case is before us for the second time on appeal.

The contract of warranty and the other evidence in this record relative to all transactions prior to and at the time of the execution and delivery of the notes are the same as the contract and facts contained in the opinion in this case on the first appeal, to which opinion, reported in 45 Ill. App. 631, reference is here made.

It is sufficient to state that prior to October 1, 1887, the harvester had been tested and found defective; that the agent of appellants had declined to take it back, but had said that he would make it work; that on October 1, 1887, a change in the indebtedness was made by the execution and delivery of the notes sued on for a less amount than the original price, and in settlement for the machine, as certain witnesses state; and that these facts would have precluded appellee from setting up a breach of warranty as a defense in this action, but for the further fact, sworn to by him, that at the time when the notes were made, it was agreed that the contract of warranty should be continued in force till the next year, at which time another trial of the harvester should be made. Giving appellee the benefit of this assertion, though it is denied by the agent of appellants, it follows that whatever occurred prior to October 1, 1887, is mere history, and has no further bearing on the case than to throw light on

the transactions of the following year. As a statement of our views upon this point, we quote the following extract from the former opinion in this case:

“ With all the knowledge and information touching the defective condition of the machine which appellee had obtained, as he says, by the repeated tests made, and on October 1, 1887, he executed the notes sued on. The agent, to whom the notes were delivered, and another witness who was present when they were executed, testify they were given in settlement for the machine.

“ Appellee contradicts these witnesses, and says the notes were given with the agreement the guaranty was to continue. If the version of appellee is accepted, he executed and delivered these notes with full knowledge of the defects in the machine, but upon condition that he should have the benefit of the provision of the printed warranty in accordance with the terms thereof, whereby he undertook, if the machine failed to work properly when started, to give appellants, or their agents, due notice, and allow them sufficient time to send a person to put it in order, and render them necessary and friendly assistance, furnish teams, etc., and if it was not then made to work well he could return the machine, and any payment he had made before the trial of it would be refunded, or a perfect machine given him in its place. It was further provided, continued possession of the machine will be evidence of satisfaction. As we construe the printed warranty, its plain meaning and intent is, that even in case the machine proved worthless as a harvester, appellants were not to lose it or be obliged to go after it, and were not liable to refund the purchase money if appellee kept the machine and failed to make the test and give the notice, and then if it was not made to work well, failed to return it within a reasonable time; and we perceive no good reason as at present advised why the parties could not lawfully make this stipulation one of the terms of the warranty, nor why it was not operative and binding as a condition precedent.

“ It was reasonable and fair to both parties. Appellee

could secure the repayment of the purchase money by performing the slight duty of returning the machine if it could not be made to work well, and thereby appellants would have received the benefit of its intrinsic value, even if it would not work well as a harvester; and we controvert no rule announced in the cases cited by the construction and effect we thus give to the written warranty. Was the condition complied with and performed by the appellee? At the time the notes were given the harvest of 1887 was over; hence, the terms and conditions of the printed warranty did not apply to the past, but to the future acts of the parties, and the offer made in June, 1887, to return the machine, is of no importance."

The evidence in this record shows that from the harvest of 1887 to the harvest of 1888 the machine was left uncovered and unprotected in the field where it had last been used. Appellee himself swears that from June till the next year, "no care was taken of it." After the machine had been tested for a few days during the harvest of 1888, appellee caused it to be taken to Ben Ripley's woods, where it remained, exposed to the weather, and in appellee's possession, as far as that question pertains to this suit, till November, 1893, the time of the second trial.

At the test, during the harvest of 1888, the machine failed to work properly. This was not due to the general worthlessness of the machine, but to a specific defect, spoken of as the locking of the binder. One witness says he "thought the trouble" was with the bull-wheel. But the machine, even though imperfect, was worth something, and continued exposure to the weather was not calculated to enhance its value.

Appellee testifies that after the machine had been tried the second year, he notified Hack, the agent, that it would not work, and offered to return it, but that Hack said he would have nothing more to do with it. Hack swears that appellee did not offer to return the machine the second year, or at any time after he signed the notes. Let us consider the case on the assumption that appellee's testimony is the truth.

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Under the contract of warranty, if the machine failed to work properly, it was the duty of appellee to notify appellants or their agent of the fact. Let it be granted that this notice was given after the trial in 1888. It was then the duty of appellants to put the machine in order. Let it be granted that appellants did not even attempt to do this. What then? It was then the duty of appellee to return the machine, whereupon appellants had the option of refunding any payments made before the trial of the machine, or of furnishing a perfect machine. Was this requirement complied with by hauling the machine into Ben Ripley's woods, and leaving it there to rust and rot? Nay, verily. But it is said that the offer to return is sufficient where the agent says he will not receive the article. We think not in a case like the one under consideration. If the machine had been taken to the agent's place of business, and the agent had refused to receive it, then, and not till then, would appellee have been relieved from responsibility; then, and not till then, could appellants have been compelled to refund any payments received or furnish a perfect machine. We can not hold that appellee performed his part of the contract by leaving the machine exposed to the injurious action of the elements in Ripley's woods.

We deem it unnecessary to pass upon the instructions, further than to say that they are erroneous as far as they fail to harmonize with the views herein expressed.

The evidence is insufficient to support the verdict, and the judgment is reversed and the cause is remanded.

Louisville, Evansville & St. Louis Consolidated Railroad Company v. George McCullom.

1. VERDICT—*An End of Litigation.*—Where the circumstances in proof do not amount to a demonstration, but are sufficient to authorize a finding of a question of fact upon a theory of one of the parties litigant, the finding must stand as an end of litigation.

VOL. 54.] L., E. & St. L. Consolidated R. R. Co. v. McCullom.

Memorandum.—Action for killing domestic animals. Error to the Circuit Court of Wayne County; the Hon. CARROLL C. BOGGS, Judge, presiding. Heard in this court at the February term, 1894, and affirmed. Opinion filed June 23, 1894.

CREIGHTON & KRAMER, attorneys for plaintiff in error.

HANNA & HANNA, attorneys for defendant in error.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

The only question presented in this case is the alleged insufficiency of the evidence to support a verdict and judgment in favor of defendant in error.

At the point where the steer belonging to defendant in error was killed, the railroad track runs nearly east and west, inclining, however, slightly to the southeast and northwest.

The wagon road runs west on the north side of the railroad track till it reaches the track, then crosses to the south side, and then runs west again. There is a cattle-guard forty-five feet east of the intersection of the two roads, and another 300 feet or more west of that point. The railroad track was not fenced at any point between the cattle-guards at the time when the steer was killed; the line had been open for more than six months, and no part of the road between the cattle-guards was within any city, incorporated town or village, laid out and platted into lots and blocks. Soon after the accident the plaintiff in error fenced the track on the west side of the crossing.

The right of recovery is conceded, provided the evidence shows that the steer got upon the track at the unfenced space west of the highway crossing, and wandered or was frightened down the track till struck by the engine. It is urged, however, that the animal, for aught that appears to the contrary, may have gone upon the track at the crossing, in which case plaintiff in error would not be liable, unless there was a failure to give the statutory signal, and such failure caused the accident. There was no eye-witness of the col-

lision. A few minutes before the train passed, a "cow brute," in the language of the witness, was standing on the railroad track about 100 feet west of the crossing. Other cattle were near this point, but not on the track. Another witness saw where the cattle had gone on the track west of the highway crossing, and still another witness saw where the cattle had been on the track west of the highway crossing, and still another witness saw where cattle had been on the track about thirty-five or forty feet west of the crossing, and also where some animal, without doubt the steer which was killed, had struck the ground about six or eight feet east or northeast of the crossing, and as the witness expressed it had "kind of slid." The train which killed the steer was running east, and the animal was found soon afterward fifteen or twenty feet east of the crossing and twenty or twenty-five feet north of the track.

From these facts and circumstances it was the duty of the jury to find whether or not the steer went upon the track west of the crossing where a fence was required by law. Direct and positive evidence, which is not required even in a charge of murder, would certainly not be required here. While the circumstances proved do not amount to demonstration, they are sufficient to authorize a finding that the steer went upon the track according to the theory of the defendant in error, and that the plaintiff in error is liable for the animal's sudden demise. The judgment is affirmed.

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Annie Tourville v. The Brotherhood of Locomotive Firemen.

1. BENEFICIARY ASSOCIATIONS—*Suspension of Members.*—The suspension of a member in a beneficiary association must be made on the books of the association as a matter of record, when required by its by-laws, if it is intended to forfeit a member's rights as a member. Where there is no proof of an assessment, of notice to pay the same, or of a legal suspension, there can not be, under the by-laws, any legal expulsion for non-payment of dues and assessments.

2. *SAME—Expulsion of Members—Burden of Proof.*—Where a beneficiary association sets up as a defense to a suit by the widow of a deceased member, that he was not in good standing in his lodge, had been suspended and expelled, the burden is upon it to show such defense by the records, and that such action in suspending and expelling was in accordance with the laws of the order.

3. *SAME—Must Be an Assessment Before a Default.*—Before a default can be alleged in the payment of an assessment by a beneficiary association, there must be proof of a legal assessment made by the association.

4. *SAME—Notice of Assessment.*—If the laws of such an association require notice to be given members of the assessment, a beneficiary can not be defeated in a suit to recover on a certificate of insurance, for failure to pay an assessment, without proof such notice was given.

5. *SAME—Tender of the Assessment, When Not Necessary.*—In the absence of proof by a beneficiary association, that an assessment has been made according to the by-laws, proof of a tender of the amount of the assessment is unnecessary.

Memorandum.—Suit on a beneficiary certificate. Appeal from the City Court of East St. Louis; the Hon. B. H. CANBY, Judge, presiding. Heard in this court at the February term, 1894, and affirmed. Opinion filed June 23, 1894.

The opinion states the case.

COCKRELL & MOYERS, attorneys for appellant.

WILLIAM P. LAUNTZ and M. MILLARD, attorneys for appellee.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellee's husband was insured in the appellant's association. He died, and this suit was brought on the policy, to recover the insurance money. On trial below a judgment was obtained for the full amount of the policy. The defense interposed was that the assured was in default at the time of his death, having been, as claimed, suspended and expelled from the subordinate lodge, through membership in which he had obtained insurance in the grand lodge, the appellant. The material portions of the policy contains the following provisions:

"This Policy of Insurance Witnesseth, that the Brotherhood of Locomotive Firemen of North America, in consid-

eration of the grand dues to them duly paid, in accordance with the provisions of the constitution of said Brotherhood, by Joe Tourville, and of the annual payment of such grand dues every year during the continuance of this policy, do assure the life of Joe Tourville. In every case when this policy shall cease and determine, or be null and void, by reason of immoral or other misconduct, and the assured shall forfeit his membership to this lodge, according to the provisions of the constitution of said Brotherhood, then this policy is canceled."

The jury specifically found certain facts, viz.: First, that the deceased, Joe Tourville, was not suspended by the lodge or by operation of the constitution and by-laws prior to his death; second, that he was not expelled from the order at any time before his death; third, that he was a member of the order in good standing at the time of his death. These findings present the real issue in this case.

Section 54 of the constitution and by-laws of the order provides how a member may be suspended and the effect of it. It is as follows:

"Sec. 54. Any member failing or declining to pay an assessment within the time specified in the notice shall stand suspended, and his beneficiary certificate shall be canceled until he has been regularly reinstated, as hereinafter provided. On the 26th day of each month, or as soon thereafter as practicable, the collector shall report in writing to the secretary the names of all members who failed to make payment of their assessment, and the secretary shall mark the beneficiary certificate of such members suspended on the beneficiary certificate register, affixing the date thereto. The secretary shall read the said list of names at the first regular meeting in the following month, record the same on the minutes of the lodge and forward a report thereof to the grand secretary and treasurer."

Section 55, which is as follows, provides how he may be expelled, and the effect of it:

"Sec. 55. Any member failing or declining to pay an assessment within sixty days after the last day of payment,

shall be reported in writing to the secretary by the collector, on the 26th day of each month, or as soon as practicable thereafter, and the secretary shall mark such members expelled from the order on the beneficiary certificate register, affixing the date thereto, which shall, in all cases, be the 26th day of the month. Such expulsion shall be the penalty of non-payment, and no action on the part of the lodge shall be necessary thereto.

“ At the first regular meeting in each month the secretary shall read a list of the members thus expelled, record the same on the minutes and make a report thereof to the grand secretary and treasurer.”

The minutes of the lodge, of which deceased was a member, were identified, and read to show the suspension and expulsion of Tourville. As to the suspension, the following occurred: “ Counsel for defendant offers to read the minutes of the lodge in evidence. Objected to by counsel for plaintiff, on the ground that he was a member of this order and he can not be suspended by making an entry of that kind in any book.

By Mr. Cockrell: We can't prove it all at once.

The Court: If it is followed up by proof it is all right; I will admit it subject to proof.

By Mr. Cockrell: This occurs in the March 22, 1888, meeting: “ Brothers Bisson, O'Leary, Cooper and Tourville suspended.” The secretary, who wrote the minutes, makes the dates, May 22, 1888.

The record of expulsion is as follows:

“ EAST ST. LOUIS, December 18, 1888.

Meeting called to order; worthy master, F. J. Hayes, in chair. Expelled members for non-payment of dues and assessments, Bisson, Tourville and Gibson.”

It appears that appellant adopted a new constitution, that went into effect February 1, 1887. Section 31 provided as follows:

“ There shall also be established a Grand Lodge Department, in which shall be published all notices of assessments, reports and other documents emanating from the Grand

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Lodge, and the publication of such notices in said department shall be legal and sufficient service of such notices upon members of the order."

As the grand secretary's evidence is understood, that publication began November 15, 1888. If that is not the correct date, no other is given by which it can be determined when the publication did begin. It is said such paper was sent to each individual member. Section 2 of the constitution provides as follows :

"The Grand Lodge has exclusive jurisdiction over all subjects pertaining to the order, and its enactments and decisions upon all questions are the supreme law of the Order and may make such assessments for revenue as may be necessary to defray the expenses of the Grand Lodge, and do all things necessary to promote the welfare of the Order."

There is no proof in this record that the Grand Lodge made any assessments, and no authority shown on the part of the subordinate lodge to make assessments, and there is no indication that it made any. The statements of F. W. Arnold, Lodge No. 44, to the "Grand Lodge, B. of L. F.," of the results in making collections, as to who paid and who failed to pay, do not afford proof of the fact of the corporate action. *Bagley v. The G. L. of A. O. of N. W.*, 46 Ill. App. 411. There is no record proof that the annual Grand Lodge dues were fixed by law, or that any assessment was made. There is no proof that the deceased received any notice to pay any assessment, as provided by Sec. 54 of the laws of this order, which, by the term of that section, was prerequisite to the right to suspend him. As heretofore stated the publication of the order's paper was not entered upon until in November, 1888, or, if before that time, there is no proof of it. How notices were served on members requiring them to pay assessments before that time, the record does not declare.

If the deceased had been suspended in March or May, 1888, it is not probable he would be assessed or receive notice of such assessment thereafter. Section 109 of the by-laws provides this: "A member under suspension for non-

payment shall forfeit all rights and privileges of membership, including the traveling card, pass words and seat in the lodge room, until his arrearage has been adjusted and he has been regularly reinstated."

The record of the suspension is so meager that it affords no proper proof of the fact. The record itself does not show there was a meeting of the lodge, a notice to Tourville or a trial, or that he was reported delinquent. What purports to be a record contains the bare statement, "Brothers * * * Tourville suspended." The suspension must be tried by the record, and it should show jurisdictional facts, as provided by the constitution and by-laws of the order. There being no proof of an assessment, of notice to pay the same, or of a legal suspension, there could not be, under Sec. 55, any legal expulsion for non-payment of dues and assessments. It will be observed, by the provision of that section, two things are prerequisite to the authority of the secretary of the lodge, to mark a member expelled from the order: first, that he shall be in default in payment of his assessments for sixty days after the last day of payment; second, that the collector shall report such fact in writing, to the secretary, on the 26th day of each month, or as soon thereafter as practicable. There is no proper proof of either fact. It will also be observed that there is no record or other proof of the cancellation of the policy or certificate, as provided by sections 54 and 55.

It is said, however, the appellee proved the fact of such default in payment. The proof was that the lodge was making a claim of some \$54. This of itself was not proof that the lodge had a legal right to suspend or expel Tourville. If not legally suspended at the time of said claim then Tourville had the legal right to pay such claim, in accordance with the demand made upon him. The offer to pay was made in compliance with such demand; before the expulsion, the money was tendered to the collector, Cramer, which he refused, under the order of the master of the lodge. The tender preserved the insured's rights, and if the demand was legal, met it. The collector had no legal right to

refuse it. He was requested to collect this money, as his evidence is understood, by the grand secretary of appellant, who had charge of such matters.

There is no proper evidence, however, that it was a lawful demand. It is said that under Sec. 83, "any member who shall be taken sick or disabled while in arrears to the lodge, can not pay said arrears during such sickness or disability, nor shall the order be liable for any benefits that said member would otherwise be entitled to receive." It is true Tourville was sick for some time, but there is no proof he was in arrears when taken sick. This section refers to a legal arrearage and not merely a claimed arrearage. If there was no legal assessment or legal claim, there could be no legal arrearage. It is also said that Tourville should have taken an appeal from the order of suspension or expulsion. If, as this record shows, there was no legal suspension or expulsion, he was not required to appeal. The instructions complained of we do not regard as erroneous.

In this case the appellant, in effect, interposed the defense that the deceased was not in good standing in his lodge; that he had been suspended and expelled. The burden was on it to show that fact and that such action was in accordance with the law of the order. *Order of Foresters v. Zak*, 136 Ill. 185.

Before default can be alleged in the payment of an assessment, there must be proof of a legal assessment by the corporation. *Bagley v. A. O. M. W.*, 46 Ill. App. 411; *Bacon on Life Ins.*, Sec. 377. If the laws of such an association require notice to be given members of the assessment, a beneficiary can not be defeated in a suit to recover on a certificate of insurance for failure to pay an assessment, without proof such notice was given. *Knights of Honor v. Dalberg*, 138 Ill. 508. And in the absence of such proof, tender of the assessment was not necessary to prevent a forfeiture. *Insurance Association v. Spies et al.*, 114 Ill. 463. The judgment is affirmed.

**Toledo, St. Louis & Kansas City Railroad Company v.
Chicago, Peoria & St. Louis Railway Company.**

1. **WATER-COURSES**—*Decrees as to by Consent.*—Where a party to a chancery proceeding obtains an order of court, to which the opposite party consents, that if a certain ditch is dug in a certain manner, it will be satisfied, such party can not, after the work is done, be heard to say the law required the other party to build a bridge instead of digging the ditch.

Memorandum.—Bill for injunction. Appeal from the Circuit Court of Madison County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the February term, 1894, and affirmed. Opinion filed June 23, 1894.

The opinion states the case.

BAYLESS & GUENTHER, attorneys for appellant; CLARENCE BROWN, of counsel.

DALE, BRADSHAW & TERRY, attorneys for appellee; ISAAC L. MORRISON and BLUFORD WILSON, of counsel.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellant filed its bill in which it alleged, in substance, that the Toledo, St. Louis and Kansas City Railroad Company, appellant herein, has for a number of years owned and operated a line of railroad extending from Toledo, Ohio, to East St. Louis, Illinois. The line of this road crosses Madison county, Illinois, running in a northeasterly and southwesterly direction. This road was built and in operation in 1882, and has continued in operation ever since. In the summer of 1890, the Chicago, Peoria and St. Louis Railway Company was engaged in constructing and building a railroad through said Madison county, along, beside and adjoining the appellant's railroad; that at the place in question the rights of way of the two railroads adjoined each other in section 27, township 4 north, range 8, west of the

3d P. M., in said county; that in the west half of said section the appellant's road crosses a creek or branch, over which it had constructed, prior to the construction of appellee's road, two bridges known and numbered respectively, 1194 and 1195, as shown on the plat in the record; that these bridges were over natural water-courses or channels; that the appellees, at and before the time of the filing of appellant's bill for injunction, were proposing and threatening to construct their said road-bed and grade across said channels, filling the same up with a solid embankment of earth, thereby obstructing these water channels, and forcing the water and the current of the streams to flow down and along the road-bed on the right of way, and against the appellant's grade and road-bed from said bridge No. 1194 to bridge No. 1195, thereby damaging, washing, destroying and rendering dangerous for use that portion of appellant's railroad and track.

That while said work was in progress, and before the natural channels of water had been filled up and obstructed, the resident engineer, H. T. Porter, for the appellant, endeavored to arrange with the officers and agents in charge of the construction of appellee's road, for the building of bridges by it across and over said channels, in such manner as not to interfere with the natural water-course of said creek, but that no attention was paid to the protests made by this appellant against the obstruction of the flow of the water in said creek. After the filing of the appellant's original bill for injunction and restraining order, an injunction was issued by the master in chancery restraining the defendants from obstructing and diverting the natural flow of water in this creek, and pending this proceeding the appellees filed their answer to said bill. Upon the hearing in chambers on the 6th day of September, 1890, the chancellor on the suggestion and proposition of the appellant, modified the original injunction so "as to permit the defendant to proceed with the construction of its road-bed and the completion of its track in the manner proposed by defendant at the place mentioned in the bill filed herein." "It is further ordered that the defendant construct the artificial

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ditches made at said place as deep as, and on a level with, the bottom of the channel, and of equal capacity of the original water-course obstructed by its new embankment."

Following this order modifying the original injunction, the appellees immediately proceeded to cut an artificial drain, or ditch, along and between the road-bed and embankment of petitioner and the road-bed of the defendant railroad company. The appellant contends the bottom of the artificial ditch when constructed was from two to five feet above the level of the bottom of the channel of the original water-course, and was wholly insufficient in times of high water to carry the natural flow of water without overflowing and throwing the water over and against the appellant's road-bed and embankment, thereby causing the same to become washed, soaked with water, damaged and rendered dangerous for the operation of trains thereon, and that the appellees wholly failed and neglected to comply with the order of the court, in this particular, that they failed to "construct the artificial ditches made at said places as deep as, and on a level with, the bottom of the channel, and of equal capacity of the original water-course obstructed by the new embankment." The appellant, afterward and before the final hearing of the matter, filed with the chancellor its supplemental bill, reciting, among other things, the foregoing facts, and in addition thereto, charged that the artificial ditch not only failed to conform to the order of the court, but was insufficient to carry off the natural flow of water, without overflowing, and throwing the water against the petitioner's road-bed and embankment, and asking that the defendant be required to construct an artificial ditch "as deep as, and on a level with, the bottom of the channel of the original water-channel and having the same capacity as the original water-course, and to riprap with stone the bank of said artificial ditch next to the petitioner's embankment and road-bed; or to construct openings through its roadway and embankment at the points where said roadway and embankment filled up and obstructed the original water-course, and of the same capacity as the original water-course." The

answer of appellee to the original bill denied that the construction of its road-bed in the manner proposed would injure appellant and its answer to the supplemental bill alleged it had fully complied with the order of the court, and the improvement so made would prevent appellant's road-bed from being injured.

On the final hearing before the chancellor, the appellant contends it proved the appellee had not complied with the order of the court, made by consent of both parties, on the hearing the 6th day of September, 1890, and that it had been and would continue to be damaged by reason of such failure. In the decree entered by the chancellor on the final hearing it is recited: "It is requested by both parties hereto, that I go upon the premises described in the complainant's original and supplemental bill before deciding this cause, and make a personal examination and inspection thereof, the same to be considered by me in connection with the proofs herein in deciding this cause; which request of the parties is by me granted and this cause is postponed for such examination. And now on this 8th day of September, 1893, I having heretofore made the personal examination and inspection of the premises, * * * and now being fully advised upon the matters heretofore submitted herein, do find that the equities of this cause are with the defendant, and order and decree that the original and supplemental bills of complaint be dismissed without prejudice to the complainant."

The record contains ninety pages of evidence, all of which was read in conference, and our conclusion is, the evidence supports the decree. The question involved is wholly one of fact, whether or not the appellee complied with the order of the court, entered by agreement of parties, on the 6th day of September, 1890. The law as to the obstruction of water-courses is as stated by appellant, but, after obtaining an order of court, to which appellee consented, that if a certain ditch was dug in a certain manner, as prescribed in such order, then it would be satisfied, it can not, after the work is done, be heard to say the law required appellee to build

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a bridge instead of cutting such ditch. The issue was as to whether the appellee had complied with such order, and to that issue the cause must be confined.

To here analyze the evidence would unnecessarily extend, without enhancing the value of this opinion. It is deemed sufficient to say the evidence sustains the decree, and therefore it is affirmed.

Louisville, Evansville & St. Louis Consolidated Railroad Company v. Edward S. Black.

1. RAILROAD COMPANIES—*Damage by Fire*.—Proof of the fact of setting the fire, though outside of the right of way, makes a *prima facie* case against a railroad company, under the law. The theory is that railroad companies, if they properly equip and operate their locomotives, will not destroy the property of adjacent land owners by fire.

2. SAME—*Must Use Their Property so as Not to Injure Others*.—The maxim *Sic utere tuo ut alienum non laedas* applies to the use of semi-public property as well as private property.

3. SAME—*Injuries by Fire*.—In an action against a defendant for injuries from fires, in considering whether the defendant is liable, the question in general is, not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage.

4. SAME—*Duty in Management of Engines—Fire*.—It is incumbent on a railroad company to use the greatest precaution in preventing engines from emitting sparks. If they send an element abroad, so destructive in its nature as fire, they must be responsible for the mischief it produces.

Memorandum.—Action for damages by fire. Appeal from the Circuit Court of Wayne County; the Hon. SILAS Z. LANDES, Judge, presiding. Heard in this court at the February term, 1894, and affirmed. Opinion filed June 23, 1894.

The opinion states the case.

CREIGHTON & KRAMER, attorneys for appellant.

HANNA & HANNA, attorneys for appellee.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

Damages were recovered by appellee for the destruction of property by fire thrown from appellant's locomotive. The train men saw the fire so communicated and called to one near to extinguish it, which he tried to do, and failed. That appellee's property was destroyed by appellant is conceded. The engine threw fire over the fence and outside the right of way. The same engine had shortly before set several fires in the same neighborhood, but first on the right of way, and, as shown by the section boss, the appellant's witness, had been reported, before this fire, to the company, for so throwing fire; he testified: "I reported it had been throwing out fire on my section." This was brought out on cross-examination, to which there was no objection.

Proof of the fact of setting the fire, though outside of the right of way, made a *prima facie* case for appellee, under the law. The statute so provides. The theory is that railroad companies, if they properly equip and operate their locomotives, will not destroy the property of adjoining land owners by fire. For this reason, in condemnation proceedings, the law does not allow an owner any consequential damages for a probable loss by fire.

The State of Illinois is traversed in all directions by about 10,500 miles of railroad, passing over, probably, as large a body of as fertile land as there is in the world. Those lands are now mostly in a high state of cultivation. The farms that adjoin these lines of railroad compose a very considerable portion of the territory of the State, so that vast interests of a great number of people are involved in this question. Much of the land is so valuable and fruitful that crops are cultivated right up to the line of the right of way, which, when matured and dry, are combustible, of which fact those operating the railroads are aware. The owners have a legal right to do so: Act 1869, Chap. 114; and the corresponding right of their protection from destruction by another in the use of his property. The maxim, *Sic utere tuo, ut alienum non laedas*, applies to the use of semi-public property as well as private property.

Accordingly, in considering whether a defendant is liable to a plaintiff for damages which the latter may have sustained, the question in general is, not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage; and this doctrine is founded on good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound to enjoy his own property in such a manner as not to injure that of another person. Broom's Legal Maxims, p. 365-7. This maxim is but the expression of an innate sense of right and justice that meets the approval of every fair-minded man. This statutory and fundamental principle of law has, however, been somewhat modified. The general doctrine on this question was first announced in this State in *Bass v. C., B. & Q. R. R. Co.*, 28 Ill. 9. It is there said by Mr. Justice Breese, p. 17: "There seems to us great good sense in the remarks of Tindall, Ch. J. He said: 'The defendants are a company intrusted by the legislature with an agent of an extremely dangerous and unruly character, for their own private and particular advantage, and the law requires of them that they shall, in the exercise of the rights and powers conferred upon them, adopt such precautions as may reasonably prevent damage to the property of third persons, through or near which their railroad passes.' We think there is great justice in the English rule and are inclined to adopt it as the most conducive to the safety of property (p. 18). It is incumbent, therefore, on the companies, to use the greatest precaution so as to secure the engines against emitting sparks. If they send an element abroad in a cultivated country, so destructive and devastating in its nature as fire, they ought to be responsible for the mischief it produces." There is no hardship in this. It will be observed how closely the court follows the maxim of law referred to. This English rule has been rigidly adhered to in this State. *C. & N. W. Ry. Co. v. McCahill*, 56 Ill. 28. The authorities are reviewed in *Forest Glen B. & T. Co. v. C., M. & St. P. Ry. Co.*, 33 Ill. App. 565, where it is said a rail-

road company may not, because of the exigencies of its business, inflict avoidable loss upon the owners of adjacent property. The act of 1869 declares "the fact that such fire was so communicated shall be taken as full *prima facie* evidence, to charge with negligence the corporation," which is but declaratory of the common law, as in effect above announced. This much has been said, because counsel seem to ignore the rights in the lawful occupancy and use of lands adjoining the railroad, and seem to think that the jury which allowed damages in this case were actuated by prejudice, notwithstanding the uncontradicted evidence heretofore stated, which is thought to be sufficient of itself to sustain the judgment.

In addition to this evidence, the contention of appellant was that the spark that set the fire was thrown about sixty-five feet, and there was evidence tending to so show. An engineer of eighteen years' experience testified that an engine properly equipped and operated would not throw a spark that distance that would set fire. Practical engineers have testified that such an engine will not throw sparks that will ignite, fifty feet. *Wabash R. R. Co. v. Smith*, 42 Ill. App. 531. It is competent to show they will not throw sparks one hundred feet. *I. C. R. R. Co. v. McClelland*, 42 Ill. 355; see also *L. E. & W. R. R. Co. v. Helverick*, 29 Ill. App. 270.

Juries and judges have a right to draw inferences from such actual facts, notwithstanding evidence as to the character of the appliance and examinations thereof made, and it is very natural that they should do so. It is well known that many locomotives are operated without setting fire, while occasionally one will, as in this case, set fire frequently. Those testifying as to the condition of the spark apparatus may have honestly believed it was in good order, while there may have been some unperceived defect, because of the difficulty of its discovery. However that may be in this case, the law, as well as the natural sense of justice, demands that one man's property shall not be sacrificed and destroyed because of the exigencies of the business of

another, without just compensation, if it can be avoided. The vast interest of the agriculturist, as well as of the railroad companies, require this, for properly considered, the prosperity of each materially contributes to the welfare of both. That it can be, in the proper operation of railroads, is constantly demonstrated by the fact that locomotives, properly equipped and handled, do not destroy property by fire.

There is another strikingly impressive illustration that has come within the observation of nearly every one, of the ability, in these days of advanced science and ingenious devices, to so equip an engine that it will not emit live or dangerous sparks. It is well known that for several years past the millions of bushels of wheat, oats and other small grain, raised all over this great and productive country, are separated from the straw to be garnered, with power supplied by steam engines, which are placed and operated, in many instances, within a very short distance of the most combustible of material, and a guaranty given against accidents or loss by fire.

The inquiry is pertinent, is there any reason why railroad companies can not as safely equip and properly operate their engines? As a rule it may be they do, for generally their locomotives do not set fires; but, probably owing to defective construction, careless inspection or improper operation, occasionally one emits dangerous sparks that cause the destruction of property of adjoining land owners, an orchard in this case, the product of many years of care and toil.

It is no answer to say that with the best managed railroads such negligence will occur. In the theory of the law the entity and management accompanies every act of the servants of the corporation, performed in the line of duty. While individual interests must to a certain extent yield to the larger public interests, that doctrine has not been carried so far as to permit, in the interest of the public, any concern, however great, to so use its property as to destroy private property if it can be avoided, without just

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compensation. It "shall not be taken or damaged for public use without just compensation," is the language of our constitution. The individual acquires property under the encouragement and protection of this fundamental law, which should also shield him in its enjoyment. The right of private property is sacred and dearly prized. The ordinary person is not of that philanthropical spirit and philosophical temperament to submit with complacency to the destruction of his property by fire, by another, pursuing a business for its "own private and particular advantage," without recompense, under the pretense that it is for the public good.

No point is made in this case as to the extent of the damages sustained, or as to the amount allowed by the jury. No question of law is raised in the argument of appellant's counsel, the claim being that the evidence does not sustain the verdict. Our conclusion is that it does, that the judgment is just, and therefore it is affirmed.

City of Cairo v. Adams Express Company.

1. CITIES AND VILLAGES—*Power to License Carriers Limited to the City Limits.*—Under Par. 42, Art. 5, Sec. 1, Ch. 24, R. S., authorizing cities and villages to license, tax and regulate expressmen and all others pursuing like occupations, the power of the city is limited to the licensing, taxing and regulating the business as carried on within the city limits, and that those only who carry on that business within such limits, can, by virtue of the statute, be required to pay a license for the privilege.

2. SAME—*Ordinance Licensing Carriers—Application.*—An ordinance providing that every person, copartnership or corporation carrying on the express business in the city of Cairo shall be deemed an expressman or expressmen, and it shall be unlawful for any such expressman or expressmen to carry on the express business within the city without a license, as such, does not apply to expressmen whose business is not carrying express matter from one place to another within the city for hire, but to receive and deliver there, such matter transported for hire to that place from outside points, and from the city to places beyond its limits.

Memorandum.—Suit for violation of a city ordinance. Appeal from the Circuit Court of Alexander County; the Hon. ALONZO K. VICKERS, Judge, presiding. Heard in this court at the February term, 1894, and affirmed. Opinion filed June 23, 1894.

The opinion states the case.

GILBERT & GREEN, attorneys for appellant.

LANSDEN & LEEK, attorneys for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT. Appellee was charged with a violation of the provisions of the following ordinance of the city of Cairo:

“Section Six. Every person, copartnership or corporation carrying on the express business in the city of Cairo, shall be deemed an expressman or expressmen, and it shall be unlawful for any such expressman or expressmen to carry on the business within the city without a license as such. Such license may be obtained of the city clerk upon payment into the city treasury of the sum of one hundred dollars per annum, in like manner as other licenses are issued, and any person, copartnership or corporation who violates the provisions of this section shall forfeit and pay for the use of the city, the sum of not less than twenty-five and not more than two hundred dollars for each offense, provided that persons, copartnerships or corporations engaged only in transporting baggage or merchandise from one place to another within the city shall be deemed porters, baggage-men or hackmen as the case may be, and not expressmen, within the meaning of this section.”

A jury was waived, the cause was tried by the court upon a state of facts admitted by the parties to be true, among others that defendant is an incorporated company under the laws of the State of New York, carrying on a general express business in various cities in the United States, including the city of Cairo, and had offices in said cities at which it received parcels and packages and sent same for hire, in charge of its messengers, to other cities, and delivered from its office in Cairo, in various parts of the city, such parcels

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and packages received at, and brought by it in the same manner from other cities. That its chief office was in the city of New York, and the greater portion of said parcels and packages were so received, carried and delivered by it from and between points in different States, but in addition to such interstate business, it carried on a general express business between points in the same State. That the principal part of its express business, so carried on at its office in Cairo, consisted of the receipt of parcels and packages to be sent by it to points beyond the State, and the delivery of such express matter to persons in Cairo, received at its office there, from points beyond the State. That it also received at its said office parcels and packages to be carried for reward by its messengers to points and cities in Illinois, and delivered such express matter at and from its said office to persons at their business houses in Cairo, received by it at other points and cities in Illinois, to be carried by means of its messengers for hire and reward to said city of Cairo, and was carrying on its said express business at the date of the summons, without the license required by said ordinance, and that defendant was not engaged in transporting baggage, parcels, packages or merchandise from one place to another in said city otherwise than simply transporting from its office there, such express matter as it received by due course of its express, for persons residing in Cairo, and delivering the same to them at their places of business. At the trial appellant offered said section of the ordinance in evidence, and the appellee objected to its introduction on the ground that it was unconstitutional, illegal and void.

The objection was sustained, and the court refused to admit the said section in evidence, and no other evidence being offered, the court found for the defendant, overruled appellant's motion for a new trial and entered judgment on said finding in favor of defendant. Exceptions to the several rulings of the court were duly taken by appellant. Appellant claims the power to enact and reinforce said sixth section of the ordinance is conferred upon it by Par. 42, Art. 5, Sec. 1, Chap. 24, Rev. Stat., which reads as follows:

“To license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen and all others pursuing like occupations, and to prescribe their compensation.” In *City of East St. Louis v. Bux*, 43 Ill. App. 276, a case decided by this court, in which Bux was acquitted in the court below of the charge of violating the provisions of a city ordinance depending for its validity upon the power granted by the above quoted statutory provision, we affirmed the judgment and held that power was limited to the licensing, taxing and regulating the business of common carriers, carried on entirely within the city limits, and that those only who carry on that business within such limits, could by virtue of that provision be required to pay a license for the privilege and be subjected to a penalty for failing or refusing so to do, citing *Farwell v. Chicago*, 71 Ill. 269; *Joyce v. E. St. Louis*, 77 Ill. 156; *City of Collinsville v. Cole*, 78 Ill. 114.

Adhering to the views above expressed, we are of opinion appellee is not included in the class and vocation of expressmen, within the meaning and intent of that word as used in the statute, nor to that class whose compensation the city was empowered to fix and limit. Its business was not carrying express matter from one place to another within the city for hire, but to receive and deliver there such matter transported for hire to that place from outside points, and from the city to places beyond its limits. In our judgment said sixth section of the ordinance can not be held to apply to the business appellee was engaged in, and it was not liable to pay the license thereby imposed, or to the penalty therein prescribed for failing or refusing to pay such license. The court did not err in refusing to admit said sixth section in evidence nor in its finding and judgment. The judgment is affirmed.

Township of Madison v. Gallagher.

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Township of Madison v. Jesse Gallagher.

1. **FREEHOLD—Highway by Prescription.**—The question as to whether a road exists by prescription involves the determination of a freehold, and no appeal lies to this court.

Memorandum.—Appeal from the Circuit Court of Lawrence County; the Hon. SILAS Z. LANDES, Judge, presiding. Heard in this court at the February term, 1894, and dismissed. Opinion filed June 23, 1894.

H. G. MORRIS and McCauley & Rowland, attorneys for appellant.

J. C. ALLEN and R. B. WITCHER, attorneys for appellee.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellant brought this suit against appellee for obstructing a public road, by encroaching upon the same with a fence. The road obstructed is particularly described in the written complaint. The issue of fact was whether there was a road by prescription, and on that issue the finding and judgment was in favor of appellee. The necessary result of this judgment is the determination of a freehold (*Chaplin v. Com'rs of Highways*, 126 Ill. 264; *Town of Brushy Mound v. McClintock*, 146 Ill. 643), and therefore this court has no jurisdiction of the appeal. The appeal is dismissed with the right of appellant, if desired, to withdraw record and brief.

East St. Louis Connecting Railway Company v. William Jenks, Admr., etc.

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67	42

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73	264

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98	1547

1. **NEGLIGENCE—Pleading and Proof—Wantonness and Intentional Wrong.**—The degree of negligence is a matter of proof and not of averment necessarily, yet wantonness or intentional wrong is not legally classed with any degree of mere negligence. Gross negligence is not in law a designated and intentional mischief, although it may be cogent evidence of such fact.

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2. **SAME—Contributory Negligence as a Defense.**—Where the action is founded on negligence of any degree, contributory negligence is a defense, but it is not, where the injury is willful.

3. **INTENTIONAL WRONG—As a Ground of Action.**—Intentional wrong as a ground of action is not involved in a case counting for mere negligence.

4. **NEGLIGENCE—Special Findings and the General Verdict.**—In an action for damages resulting from a death caused by negligence, where the charge was that the defendants suddenly and without warning moved a locomotive and train, the jury found a general verdict for the plaintiff, but also found specially that the men in charge of the train before starting it, gave all the warning required by law. The judgment entered upon the general verdict was reversed.

5. **RAILROAD CARS—Children Hanging Upon.**—It is not the duty of employes of a railroad company before starting a train, to make an examination to see if any children are hanging upon or have crawled under it.

6. **RAILROAD COMPANIES—Not Insurers.**—A railroad company is not an insurer against every accident which happens in a street; when it has exercised the highest degree of care for the safety of the citizen consistent with a reasonable exercise of its franchise, if there is no negligence or willful misconduct, there is no liability.

7. **SAME—Duty Regarding Children.**—The fact that a child of tender years and incapable of exercising care, is the injured party, in the absence of knowledge of its peril, does not affect the question of the care to be used by a railroad company, nor the degree of care imposed by the law.

Memorandum.—Action for damages. Death from negligent act. Appeal from the Circuit Court of St. Clair County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the February term, 1894. Reversed and remanded. Opinion filed June 23, 1894.

CHARLES W. THOMAS, attorney for appellant.

JAMES M. HAY, attorney for appellee.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

This suit was brought by appellee to recover damages for the death of his intestate, caused, as alleged, by the negligence of the servants of appellant in the operation of a train in the streets of the city of East St. Louis. The declaration contains two counts.

The first in substance avers that on the 16th day of February, 1891, the defendant was transporting gravel, etc., in its

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cars to 10th street in said city and unloading same there; that after unloading the cars, the train was left standing near the house of the deceased, who, being a child of tender years, without fault of its parents, or other relatives, wandered away from his home to the said train so left standing, and the said servants returning to the train, "suddenly and without warning, recklessly, negligently and carelessly started and moved the said train of cars, and he, the said Robert Jenks, being three years of age, was then and there instantly killed."

The second count avers the operation of the train on 10th street for the purpose stated, and the unloading of gravel near plaintiff's house, and that the deceased without fault strayed away from his home unobserved, "and slid down the heap of earthy gravel and sand unloaded from said cars, under the said train, and when the said agents returned to said locomotive and cars, which they had left, it thereupon became and was the bounden duty of defendant to ring a bell, sound a whistle, or to give some other signal or warning before starting its said locomotive and cars, yet the defendant did not regard its duty nor use due care in that behalf, but on the contrary, the defendant, by its agent, did carelessly, negligently and with conscious indifference to consequences, cause said locomotive and cars to be suddenly and violently started and moved, thereby the said Robert Jenks then and there being instantly killed."

The jury returned an answer with the general verdict, to the following interrogatories:

Did defendant's servants, before starting the train, give warning that it would start?

Answer. Yes.

Did defendant's servants in charge of the locomotive give a warning by ringing the bell or sounding the whistle before the train moved?

Answer. Yes.

Was the injury due to the failure of defendant's servants to ring a bell or sound a whistle on the locomotive?

Answer. No.

The defendant moved the court to enter judgment on the special findings in favor of defendant.

The court refused to do so and defendant excepted.

Then the court gave judgment for plaintiff for \$387.50 on the general verdict and defendant excepted.

The errors assigned question the ruling of the court on the defendant's motion for a judgment in its favor on the special finding, and in entering judgment on the general verdict in favor of the plaintiff. The record contains no bill of exceptions.

The issue is here, whether or not the special findings respond fully to the averments of negligence charged in the declaration. Both counts charge merely negligence. There is no averment of wantonness, willfulness or intentional wrong in either count. The second count charges the defendant's servants with having started the train "with conscious indifference to consequences," but this was because they failed "to ring a bell, sound a whistle, or give some other signal or warning before starting." While the degree of negligence is a matter of proof and not of averment, necessarily, yet, wantonness or intentional wrong is not legally classed with any degree of mere negligence. Gross negligence is not in law "a designed and intentional mischief, although it may be cogent evidence of such fact." *J. S. E. Ry. Co. v. Southworth*, 135 Ill. 255; *I. C. R. R. Co. v. Beard*, 49 Ill. App. 544. Where the action is founded on negligence of any degree, contributory negligence is a defense. *G. C. U. R. R. Co. v. Fay*, 16 Ill. 558. It is not where the injury is willful. *L. S. & M. S. Ry. Co. v. Bodemer*, 139 Ill. 606; *Beard case, supra*, 245.

Intentional wrong as a ground of action is not involved in a case counting for mere negligence. *C. & A. R. R. Co. v. Robinson*, 106 Ill. 144.

The real charge of negligence is that the defendant "suddenly and without warning, started and moved the said locomotive and train."

The jury specifically found that the defendant's servants, *before* starting the train, gave warning that it would start,

by ringing the bell or sounding the whistle, before the train moved, and that the injury was not due to failure to ring the bell or sound the whistle before the train moved.

Section 6, Chap. 114, provides, "Every railroad corporation shall cause a bell of at least thirty pounds weight, and a steam whistle placed and kept on each locomotive engine," for the purpose of giving warning at crossings (*Ibid.*), "and a reasonable time before starting a train at any station, or within any city, incorporated town or village." The finding of the jury shows this law was complied with. The law is in the nature of a police regulation fixing the standard of duty or care required in starting a train at the places indicated.

What other warning could the defendant's servants be expected to give to avoid the charge of negligence? The warning given was that required by law and recognized by all usage. The appellee's counsel, in their argument, insist it was their duty "to have examined by personal inspection to see if there were any children under, or in a position of danger, and remove them." They ask "was it not negligence in them to leave this train standing for a long time where children could get under it and climb up between the cars, and hastily and suddenly start off?"

It is customary to leave trains standing in streets on the railroad company's right of way, at almost every station, where, too often, children congregate. If before starting such trains, such an examination as suggested is required by law to be made, to see if there are any children under or on the train, in order to be in the exercise of ordinary care, then this question becomes a very important one. No authorities are cited wherein such a rule of law has been laid down as to the operation of trains. In the case of *C., B. & Q. R. R. Co. v. Stumps*, 55 Ill. 367, it was held not to be negligence not to station a man at each car to keep children off the train in the streets of a city. In this case the child was too young to be charged with negligence. The case was re-affirmed in 69 Ill. 409, where it is said, "The law has not made the railroad company an insurer against

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every casualty that may happen in a street, when it has exercised the highest degree of care for the safety of the citizen, consistent with a reasonable exercise of its franchise. If there is no negligence or willful misconduct, there can be no liability, no matter how severe the injury inflicted, nor whether the party injured is capable of exercising care for his personal safety." In the case of C. & A. R. R. Co. v. McLaughlin, 47 Ill. 275, a detached car on a public street was started without signal, whereby a boy's foot was crushed who was playing about the car; it was held to be no part of the duty of the company to maintain a guard over cars left standing on the track, to warn children from playing about or getting upon them. See Stumps case, 69 Ill., p. 414; C. & A. R. R. Co. v. Lammerts, 12 Ill. App. 408.

The statute required the appellant's servants to ring the bell or sound the whistle before starting the train, which is the same kind of warning required to be given before reaching a crossing. As to signals at crossings it is said in C. & A. R. R. Co. v. Robinson, 106 Ill. p. 146, "These signals are well understood by every one, and they constitute all the 'warning' the law requires the servants on the train to give."

In either case, if the servants operating a train knew before starting it, or before reaching a crossing, that a child was on the track exposed to danger, then of course the servants would have been required to exert every effort reasonably possible to avoid injuring it, for an injury inflicted with such knowledge, and the power to prevent it, would have been wanton and willful. This declaration does not count for an injury so inflicted. The negligence charged is in failing to give warning before starting the train and in suddenly starting the same—not for intentionally or wantonly running over the child. There is no suggestion in the pleadings or the argument of counsel that the servants operating the train knew or had reason to know the child was in a place of peril. The fact the cars were left standing in a public street was not sufficient to put them on notice, as shown by the cases above cited.

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In such a case as this, the question is, was there a failure to exercise ordinary care, there being no willful act alleged. *C. W. D. Ry. Co. v. Ryan*, 131 Ill. 479.

The fact that the child was of such tender years as to be incapable of exercising care on its part, does not affect the question of the care used by the servants of appellant, nor the degree of care imposed by the law, in the absence of knowledge of its peril, as appellee's counsel seem to assume. Negligence, or the want of care, must be predicated on the failure to perform some duty imposed by the law. That duty, as has been observed, was to give warning before starting the train by sounding the bell or the whistle of the engine. Primarily no other duty was required, though the train was liable to excite the curiosity of children, and attract them to it. *C. & W. I. R. R. Co. v. Roath*, 35 Ill. App. 349; *C., R. I. & P. Ry. Co. v. Eninger*, 114 Ill. 79. The finding is conclusive of this trial that such warning was given and the injury was not due to such alleged failure.

It was fully responsive to the negligence charged in the declaration and therefore the judgment will be reversed and the cause remanded.

Singer Manufacturing Company v. William V. Tyler.

1. INSTRUCTIONS—*Must be Based upon the Evidence.*—In an action for a breach of contract conditioned that the plaintiff "could come and take away" certain articles from the defendant's premises, it is error to instruct that the defendant is liable for any of the property claimed to be withheld under the agreement, which was lost or destroyed, or not turned over under the agreement.

2. CONTRACTS—*Construction—Gratuitous Bailee.*—Under a contract providing that a party take his property out of a building occupied by another party, *it was held* that the other party is not liable for the loss or destruction of the property, not caused by his gross negligence. His liability is not greater than that of a gratuitous bailee.

Memorandum.—Assumpsit. Appeal from the County Court of Wabash County; the Hon. H. J. HENNING, Judge, presiding. Heard in this court

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at the February term, 1894. Reversed and remanded. Opinion filed June 23, 1894.

The opinion states the case.

GEO. P. RAMSEY, attorney for appellant.

MUNDY & ORGAN, attorneys for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This was assumpsit. The declaration counts for \$137.06, for goods sold and delivered by appellee to appellant. In like sum for goods bargained and sold to appellant by appellee. In like sum for money, goods and chattels before that time received by appellant for use of appellee. In like sum on account stated, and in like sum for the value of goods, wares and merchandise of appellee taken and converted by appellant to its own use. The copy of account sued on is headed "The Singer Mfg. Co. Dr., to property detained, etc., belonging to Wm. Tyler." Then follows the bill of items footing up \$137.06. The jury returned a verdict for \$125 in favor of appellee and judgment was entered on the verdict for that sum and costs. Appellant took this appeal.

It appears that Tyler had been in the employ of the appellant company up to some time in July, 1893, when he quit. Disputes between the parties arose concerning their business transactions, which resulted in suit being brought by Tyler against the company at the November term, 1893, of the Wabash Circuit Court, and on November 23, 1893, the following written agreement was concluded between the parties:

STATE OF ILLINOIS, }
Wabash County } ss.

In Wabash County Circuit Court, November term, 1893.

This agreement witnesseth: That whereas, a suit in assumpsit is now pending in aforesaid court, brought by W. V. Tyler against the Singer Manufacturing Company, and said company has filed the general issue and notice of set-off. Now it is agreed by the parties, that all matters in

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controversy of a civil nature, and all rights of civil action of every nature and description now existing in favor of either party as against the other, and as against any agent of defendant company, be and the same is hereby settled and released upon the following basis. Judgment is to be rendered against W. V. Tyler, plaintiff, and in favor of the Singer Manufacturing Company, defendant, on said notice of set-off, for the sum of \$125 and costs of suit, and is to take his furniture and other property out of the building occupied by said Singer Manufacturing Company, in Mt. Carmel, Illinois.

Dated November 23, 1893.

W. V. TYLER,

B. S. Organ, his attorney.

THE SINGER MANUFACTURING COMPANY,

By George P. Ramsey, attorney."

This instrument evidences a final settlement between the parties of all matters in controversy and of all transactions between them and of all rights of action either might have had against the other for any cause, up to November 23, 1893, with the provision that Tyler be permitted to take his property and furniture out of the building then occupied by appellant. By the terms of this contract, as we construe it, the property and furniture was that only, then in said building, and any that was there when Tyler left in July, 1893, but not there on November 23, 1893, was not intended to be embraced within said terms. The note of O. Z. Land, the zither, and several other articles itemized in the account attached to the declaration in this case, were items for which Tyler brought suit in the Circuit Court, and by said settlement appellant was discharged from all liability for such of the articles as were not in the building on November 23, 1893.

Had there been no agreement, assumpsit would not lie for the unlawful detention of these articles; but the remedy would be by an action in tort. If this suit can be maintained at all, it must be for a breach of the contract by appellant, in refusing to permit appellee to take his property which

was in the building, and unlawfully retaining the same. Upon this point the evidence is, that Tyler had given a chattel mortgage on his property, and after the settlement, and on the 29th day of November, 1893, he accompanied Rhodes, the agent of the mortgagee, who was sent to take the property under mortgage, to point out the same. On arriving at the building, Rhodes, who had a list of the mortgaged property, testifies he took all of it except a stove and pipe and sewing machine, awning frame and two second-hand sewing machines; that the sewing machine, stove and pipe were left by his consent, and Tyler was there and made no objection; that appellant's agent said he could take them, but requested they might be left until he could see whether he had receipted to the company for them; that afterward, before the holidays, the agent came to him and told him he could take the stove, and after this suit was begun came to him again and told him he might take the machine; that the agent told him when he asked for the awning frame, that he thought it was in the back yard, but witness looked and did not find it that day; went back since and it is in the back yard; that the two second-hand sewing machines were not in the building; that "neither the agent nor any one refused to allow us to take the goods except as I have said." Rhodes was appellee's witness. Graham, for defendant, corroborates Rhodes and says he did not refuse to let them take any of the property; that when he afterward told Rhodes he could take the stove and machine, he replied he had orders not to. Grayson, for defendant, also corroborates Rhodes and Graham as to what occurred on November 29, 1893. Tyler alone contradicts them. Much of his testimony relates to goods he left in the building in July, 1893, and ought not to have been admitted.

Even if the jury believed that part of his evidence which was relevant, in preference to that of the three witnesses who flatly contradicted him, the damages are excessive.

Both instructions given for appellee were wrong. The first informed the jury that appellant would be liable for any of the property claimed to be withheld under the agree-

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ment, which was lost or destroyed, or not turned over under the agreement. We do not understand the property was to be turned over, but appellee was to come and take it; and it is not the law that appellant was liable for the loss or destruction of any of said property, not caused by the gross negligence of its servants. Its liability was not greater than that of a gratuitous bailee. The second instruction is bad for the same reasons. The court erred in giving these instructions and in not setting aside the verdict. The judgment ought not to have been entered, and is reversed and cause remanded.

Geo. R. Durbin v. The People of the State of Illinois, etc.

1. **CONSTRUCTION OF STATUTE—*Meaning of Words.***—The word “person” or “persons,” as well as all words referring to or importing persons, extend and may be applied to bodies politic and corporate as well as to individuals.

2. **COUNTY BOARD—*May Make Complaint Against Persons Violating the Revenue Act.***—The law of construction of words authorizes the county board to make complaint against persons violating Sec. 56, Ch. 120, R. S., entitled “Revenue,” providing that if any person or corporation shall give a false or fraudulent list, schedule or statement, or shall fail or refuse to deliver to the assessor, when called on for that purpose, a list of the taxable personal property which he is required to list, he shall be liable, etc. The county board may properly make the complaint.

3. **REVENUE ACT—*Violations—Complaint Not Jurisdictional.***—The filing of the complaint for failing to comply with the revenue act is not a jurisdictional matter.

4. **DEBT—*When Proper Remedy for Penalties.***—Where a penalty is imposed without direction as to the mode of procedure for its recovery, an action of debt is a proper remedy.

5. **SAME—*Practice in Action of.***—The action of debt requires the filing of a declaration to set forth the cause of action.

6. **TAXATION—*Fraudulent Devices to Avoid.***—Where a person changed his money into greenbacks to avoid taxation, and deposited them in a bank, taking a certificate of deposit payable in current United States funds, the certificate was held liable to taxation.

7. **SAME—*Schemes to Avoid Taxation—Fraud.***—Any device, make-shift or scheme to avoid paying taxes upon one’s property, is a fraud upon the revenue law.

Memorandum.—Debt for violation of the revenue act. Appeal from the Circuit Court of Fayette County: the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the February term, 1894, and affirmed. Opinion filed June 23, 1894.

The opinion states the case.

FARMER, BROWN & TURNER, attorneys for appellant.

J. M. ALBERT, state's attorney, for appellee.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

Appellant was sued in an action of debt for the penalty imposed for a violation of Section 56 of the Revenue Act, which section is as follows:

“If any person or corporation shall give a false or fraudulent list, schedule or statement required by this act, or shall fail or refuse to deliver to the assessor, when called on for that purpose, a list of the taxable personal property which he is required to list under this act, he or it shall be liable to a penalty of not less than \$10, nor more than \$2,000, to be recovered in any proper form of action, in the name of the people of the State of Illinois, on the complaint of any person; such fine, when collected, to be paid into the county treasury.”

The court tried the case without a jury, and rendered judgment against appellant for a penalty of \$50 and for costs.

The first point made by appellant in the argument of this case is that the action was not brought “on the complaint of any person.” The position taken by counsel is “that the making of the complaint is a jurisdictional matter that must precede the commencement of the suit, and that the complaint must be in writing.”

The facts bearing upon this branch of the case are undisputed and may be stated in a few words. On March 8, 1893, the board of supervisors of Fayette county, passed a resolution directing the state's attorney, J. M. Albert, to bring suit against appellant and others for the violation of

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the section of the revenue act above quoted. The summons in this case was issued, at the instance of the state's attorney, on the 17th day of the following August, and the declaration was filed on the 22d day of the same month. The commencement of this declaration was as follows: "The People of the State of Illinois, plaintiff, on complaint of the county board of said Fayette county, by J. M. Albert, its state's attorney for said county, complains of George R. Durbin, defendant, of a plea that he render to the plaintiff the sum of \$2,000 which he owes to and unlawfully detains from it." At the September term of the Circuit Court a demurrer was sustained to this declaration, whereupon the declaration was amended by the erasure of the words, "the county board of said Fayette county," and the substitution therefor of the words, "Joseph L. McGraw made to J. M. Albert, state's attorney of said Fayette county." At the same time there was filed a complaint in writing, signed and sworn to by the said McGraw.

No objection is made to this complaint, except that it was not filed before or at the time of the commencement of this suit. Afterward appellant made a motion to quash the complaint and dismiss the suit. This motion was overruled, and appellant filed a plea *nil debet*.

We are inclined to the opinion that no complaint in writing is necessary, and that the declaration as originally filed was sufficient. The word complain or complaint is used repeatedly in the statutes in such a connection as to show that, when the word is used without qualification, an oral statement and not a formal written one, is referred to. (See sections 320 and 348 of the Criminal Code, and section 97 of the Revenue Act, Hurd's Statutes.) It seems to us that a resolution of the board of supervisors directing the state's attorney to sue an individual named for a violation of the section of the revenue act given above is a sufficient complaint within the meaning of the law, and that to hold otherwise would be a forced construction of the statute, securing to violators of the law an unnecessary technical advantage rather than a substantial right.

Beyond doubt the word "person" as used in the statute authorizes a recovery upon the complaint of a body politic or corporate. The law says that "the word 'person' or 'persons,' as well as all words referring to or importing persons, may extend and be applied to bodies politic and corporate as well as individuals." Hurd's Statutes, Chap. 131, Sec. 1, paragraph 5; Mineral Point Railroad Company v. Keep, 22 Ill. 9; Commercial Insurance Company v. Mehlman, 48 Ill. 313; Ochs et al. v. The People, 124 Ill. 399. This authorizes the county board to make complaint. If the complaint must be in writing other than a resolution of the board, who would sign it? who would swear to it? Must the board make a formal accusation something after the manner of presentment by a grand jury?

But let us advance a step, and concede, for the sake of the argument, that a formal complaint in writing and under oath is necessary to a recovery under this statute. We hold that the filing of the complaint is not a jurisdictional matter, but that the court properly overruled appellant's motion to quash the complaint, which was filed when the declaration was amended. We waive any irregularities in the presentation of this question and consider it on the merits.

The statute declares that the penalty shall be "recovered in any proper form of action, in the name of the people of the State of Illinois on the complaint of any person."

Where a penalty is imposed without direction as to the mode of procedure for its recovery, an action of debt is a proper remedy. City of Chicago v. Enright, 27 Ill. App. 559. The action of debt requires the filing of a declaration to set forth the cause of action. If in such case a complaint in writing is required, it must be for some other purpose than to show the cause of action. If the purpose be, as is suggested by counsel, to prevent a recovery at the instance of an irresponsible person, the object of the law is accomplished if the complaint be filed at any time before the trial.

Trifling with the law can be prevented by the imposition of terms before allowing the complaint to be filed after the commencement of the suit. It may be observed that the

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law is not so careful of the interests of those who are seeking fraudulently to avoid the payment of their taxes, as to permit an action under this section to be defeated for want of a written complaint, when the plaintiff offers, as soon as the question is raised, to file a proper complaint. This case is very different from one where the complaint stands in place of a formal criminal accusation. It is not like a suit under the act in regard to forcible entry and detainer, where the statute requires a complaint in writing to be filed, and authorizes the issuing of process only upon the filing of such a complaint.

We think the court did not err in overruling the motion to quash the complaint and dismiss the suit.

The next question demanding consideration is, does the evidence justify the finding and judgment? No proposition of law having been presented to the court, it follows that if the evidence will support the judgment under any proper theory of the law, it must be presumed that the court decided the case upon that theory, and the judgment must be affirmed.

The evidence shows that appellant was called upon by the assessor and made a schedule of his property on June 21st, but did not schedule any grain of any kind, or any moneys or credits of any kind whatever, in bank or elsewhere. The evidence further shows that on May 1st of the same year, appellant had on hand a small quantity of wheat and \$5,600 on deposit in a bank, for which he held a certificate, payable "in legal tender notes, in current United States funds." The evidence also shows that appellant made an affidavit that the schedule was a full, complete and correct schedule of all the personal property, subject to taxation, owned or controlled by him on the 1st day of May, and which he was, by law, required to list. The above facts, if unexplained, are sufficient to support the judgment of the court.

Appellant's defense as to the grain is that he had but a few bushels of wheat, barely enough for bread, and that the assessor did not require him to list the wheat for taxation.

The assessor swears that appellant said nothing about wheat when the schedule was made, though the item, "grain of all kinds," was read to him; that several days afterward, when notifying appellant to appear before the board of review, he, the assessor, was shown by appellant about seventy-five bushels of wheat, which appellant had owned on the 1st of May.

In this conflict of the evidence, it was the province of the court to find the facts, and we can not interfere with the judgment on the ground that the court saw fit to believe the assessor.

The reason given by appellant for not listing his money for taxation is that he thought it was within the provision of the law of the United States, which exempts treasury notes and other obligations of the United States from taxation.

It seems that before May 1st, appellant took a package of greenbacks to the bank and asked the cashier to take care of the money for him. The cashier told appellant that, in case of a burglary, the bank would not be responsible for a special deposit. Acting upon the cashier's advice, appellant permitted his money to be mingled with the money of the bank and took a certificate of deposit therefor.

Afterward, and before May 1st, another deposit of greenbacks was made in the same manner, and the old certificate was surrendered, and a new one taken for the whole amount.

The last certificate was held by appellant on May 1st, and is the one above described. After the making of the schedule, and after the question had been before the board of review, appellant took the certificate to the cashier and had him erase the words "in current United States funds."

It is admitted by appellant that the moneys represented by the certificate were in fact subject to taxation. *Wetherell v. O'Brien*, 140 Ill. 146; *Mutual Accident Association v. Jacobs et al.*, 43 Ill. App. 340. But it is said that appellant sought to invest his money so that it would be legally exempt from taxation; that he made an honest mistake; that there was no fraud in the transaction; and that, without fraud, there is no liability under the statute.

Durbin v. The People.

It will be noticed that the penalty is imposed for giving a *false or fraudulent* list, or for *failing or refusing* to give a list of taxable personal property.

We readily concede that the word *fail* does not cover a case of mere forgetfulness. But this is not a case of mere forgetfulness. There is more in it than an honest mistake. The whole transaction smacks of fraud, and the court was justified in finding that appellant was a violator of the law.

Consider a few of the facts appearing in this record. Appellant was one of the richest men in his township, and nine out of ten men in the township, friends as well as others, thought he had been avoiding the payment of his proportion of the taxes for years. At least that was the statement made to him when he was before the board of review, and he did not see fit to deny any part of the statement, but answered "that he had no children to send to school; that he paid as high as his neighbors, and if he had any money he could get out of the taxes on, he would do it." He further said that "it wasn't anybody's business outside if he could beat this tax." In relating what occurred before the board of review, appellant swears: "They asked me something about how I got so much greenbacks, and I told them I had changed other money for it in order to get out of paying tax. They asked if I got it for that purpose, and I said, of course I did."

It is conceded that if appellant had kept his greenbacks, these would have been exempt from taxation. But the fact that, in seeking to avoid the payment of his tax, he made a blunder as to his deposit in the bank, should not be regarded as a defense to this action. He took the responsibility; he did not submit the question to the assessor, but he settled it for himself, and swore that he had no moneys or credits subject to taxation; he violated the law, and the court properly assessed a penalty against him. The judgment is affirmed.

Patrick Leahy v. Ancient Order of Hibernians.

1. **MUTUAL BENEFIT ASSOCIATIONS—Sick Benefits—Construction of By-Law.**—Under an article of the constitution providing that the weekly benefits shall be \$5 for each week for thirteen weeks during any twelve months, and no fractional part of a week will be allowed, provided, *it was held*, if the sickness is prolonged into different twelve months, the member is entitled to the same benefits as if he had two different sicknesses, one in each of such twelve months.

2. **SAME—Constitution and By-laws Must Be Harmonious.**—The constitution and by-laws should be construed so that, like the constitution and statutes of a State, they will harmonize.

Memorandum.—Assumpsit on benefit certificate. Error to the Circuit Court of St. Clair County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the February term, 1894. Reversed and remanded. Opinion filed June 23, 1894.

STATEMENT OF THE CASE.

The facts in this case are plain and in all their essential particulars are not controverted.

The plaintiff in error was and is a member of Division No. 1, Ancient Order of Hibernians, of East St. Louis, the defendant in error, which is a beneficial and social organization, organized and acting under and by virtue of authority granted by the Supreme Lodge of the United States.

The evidence in the case shows that the plaintiff in error, while such member, was taken sick, in the summer of 1887, since which time he has continued to be sick and unable to work; that in the year 1888, he went to Ireland, where he still remains; that he received sick benefits to the amount of \$65, being for thirteen weeks, at \$5 per week, and thereafter there was donated to him by the defendant in error the sum of \$25, during each of the years 1889 and 1890, making a total of \$115.

The defendant in error refused to pay any more sick benefits, and thereupon the plaintiff in error brought this suit in the year 1891, which was tried before a jury, and after the evidence for the plaintiff in error was all in, a verdict

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was returned in favor of the defendant in error, under the following instruction: "The court instructs you that the plaintiff failed to prove a cause of action, and your verdict should be for the defendant," to the giving of which instruction the plaintiff excepted.

In the language of the counsel for the defendant in error, "The only question involved in this case arises upon the proper construction to be placed upon article 15 of the constitution of the defendant in error, and article 8 of the by-laws." Article 15 of the constitution is as follows: "The initiation fee of this order shall be three dollars; the monthly dues shall not be less than thirty-five cents, nor more than fifty cents; the weekly benefits shall be five dollars for each week for thirteen weeks during any twelve months, and no fractional part of a week will be allowed, provided, however, that the board of directors and the committee on sick shall determine what further amount, if any, shall be appropriated. On the death of a member the sum of fifty dollars shall be appropriated to defray the funeral expenses."

Section 5, article 8, of the by-laws of defendant in error provides that "When the division has paid thirteen weeks' sick benefits to any member in any case of sickness, if such sickness still continues, it shall be the duty of the president to convene the board of directors of the division and the visiting committee in meeting, and consider whether the full sick benefits shall be continued during that illness, or reduced to less than five dollars per week, or discontinued. The directors and visiting committee shall be guided by the circumstances of the member and the general term of our laws. No action shall be taken under this section until thirteen weeks' benefits have been paid."

The constitution is that of "The Ancient Order of Hibernians of the United States of America." It was adopted at a national convention held at Cleveland, in 1884, as revised by a committee, while the by-laws were adopted as revised at a State convention held in Illinois the same year.

The defendant in error is a division of the general order above named.

The plaintiff in error was a member, as we gather from the evidence, before the revision of the by-laws, and has always kept his dues paid as thereby required. There is no claim made that his absence in Ireland forfeited or impaired any of the rights obtained by membership, nor that application for relief was not properly made.

WM. P. LAUNTZ, attorney for plaintiff in error.

BRIEF OF DEFENDANT IN ERROR, J. J. RAFTER, ATTORNEY.

Courts in construing by-laws will interpret them reasonably, and will not scrutinize their terms for the purpose of making them void and invalid, in case every particular reason for them does not appear. *Hibernia Fire Engine Co. v. Harrison*, 93 Pa. St. 264; *Angell & Ames on Corporations*, Sec. 337.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The question in this case is narrowed down to the proposition as stated by the counsel of defendant in error. "Was the defendant in error under its constitution and by-laws, compelled to continue the payment of sick benefits to the plaintiff in error indefinitely during the time plaintiff in error remained sick?"

It will be observed the constitutional provision is mandatory in its character as to the requirement of the payment of sick benefits. The weekly benefits shall be five dollars for each week for thirteen weeks during any twelve months, provided, however, that the board of directors and the committee on sick shall determine what further amount, if any, shall be appropriated. The term "during any twelve months" means the same as "during any year." The phrase is one of limitation; what does it limit? Not the period of sickness, the number of sicknesses, nor the number of "thirteen weeks" that benefits must be paid. That is, it would not be contended if the member was sick for thirteen weeks only during one year, and then again became and remained sick for another thirteen weeks the next year,

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that he could not receive sick benefits for each of such years. To so construe the constitution would be to hold that the benevolent feature of the order was exhausted by the payment of thirteen weeks' benefits, without regard to the length of time of membership. Such a construction would not accord with the preamble of the constitution, which declares, "the membership of this order do declare that the intent and purpose of the order is to promote friendship, unity and true Christian charity among its members, by raising a stock or fund of money for maintaining the aged, sick, blind and infirm members."

It is clear that if a member was sick at different times, during different "twelve months" or years, though such sickness should be prolonged more than "thirteen weeks" each of such years, that he would be entitled to the full amount of benefits each year. Therefore, the limitation is not as to the number of sicknesses. There is no more reason for holding the limitation applies to the length of time the member is sick. If the sickness is prolonged into different "twelve months" the member is entitled to the same benefits as if he had had two different sicknesses, one in each of such twelve months. The limitation was intended to measure the amount of benefits which the member had a right to demand during a certain period of time, viz., twelve months; that is, during no year shall the member be entitled to receive more than thirteen weeks' benefit at the rate of \$5 for each week, though he may be sick during the entire year. This construction is believed to be in accord not only with the letter of the law, but also with the spirit of benevolence that pervades the constitution of this order. It is urged, however, the by-laws indicate a different construction. The constitution and by-laws should be construed, if practicable, so that, like the constitution and statutes of the State, they will harmonize; that is, it will be presumed the framers of the by-laws intended the language used should be interpreted so that they will harmonize with the fundamental law of the order.

By the constitution the proper officers could extend benefits beyond the period of thirteen weeks during any one

year, if they deemed it best so to do, or having determined to extend such benefits, which, being a matter of grace, they could at any time thereafter discontinue for such year. Sec. 5 of Art. 8 of the By-laws, read in the light of this interpretation, will harmonize with the constitutional provision relating to benefits. The authority thereby given to discontinue benefits relate to those benefits granted as a matter of grace, and not to those granted by virtue of the law. The judgment is reversed and the cause remanded.

City of Cairo v. Feuchter Brothers.

1. CITIES AND VILLAGES—*Ordinances—Sale of Intoxicating Liquors.*—An ordinance which imposes a license fee of \$100 upon every wholesale liquor dealer, and defines this branch of the liquor business as the selling or giving away in quantities of five gallons or more, and declares that it shall not apply to any one holding a valid license for the sale of liquors in less quantities than one gallon, under an ordinance which imposes a license fee of only \$500 for the latter privilege, is void for unjust discrimination, for the reason that the retail license can not be issued *under the statute* for less than \$500, and consequently the retail dealer in such case pays nothing for the wholesale privilege, while others are charged \$100 therefor.

2. SAME—*No Power to Discriminate in Licensing the Sale of Liquors.*—A municipal corporation can exact one license fee of those selling in less quantities than one gallon, and another and different fee of those selling in quantities of five gallons or more, without unjust discrimination.

3. SAME—*Sale of Intoxicating Liquors.*—A municipal corporation can fix a fee of more than \$500 for persons selling liquor in any quantities, and a smaller fee for those selling in quantities of five gallons or more, and such a classification will be reasonable and within the protection of the law.

Memorandum.—Prosecution for violation of an ordinance. Appeal from the Circuit Court of Alexander County; the Hon. ALONZO K. VICKERS, Judge, presiding. Heard in this court at the February term, 1894, and affirmed. Opinion filed June 23, 1894.

The opinion states the case.

APPELLANT'S BRIEF, GREEN & GILBERT, ATTORNEYS.

Appellant contended that the validity of Ordinance No.

54	112
159s	155
54	112
81	518
54	112
183s	642

City of Cairo v. Feuchter Bros.

513 is abundantly sustained by *Denney v. City of Chicago*, 120 Ill. 631, and the following other cases: *East St. Louis v. Wehrung*, 46 Ill. 392; *Timm v. Harrison*, 109 Ill. 593, 600; *Schumm v. Gardner*, 25 App. 633, 636; *Ammon v. Chicago*, 26 App. 641; *Byers v. Olney*, 16 Ill. 35, 36.

As to question of uniformity see *People v. Thurber*, 13 Ill. 554, 556; *Walker v. Springfield*, 94 Ill. 365, 372; *Howard v. Chicago*, 108 Ill. 499, 500; *Braunn v. Chicago*, 110 Ill. 187, 193; *Hawthorne v. People*, 109 Ill. 302, 311; *Chicago v. Rumpff*, 45 Ill. 96 (top pg.); *Munn v. People*, 69 Ill. 80.

The city has a large discretion as to details. *City Rock Island v. Huesing*, 25 App. 611. Amount is within discretion of municipality. *Distilling Company v. Chicago*, 112 Ill. 19, 22.

Courts will give ordinances a reasonable construction and sustain rather than overthrow them. *Dillon, Mu. Corp.*, Vol. 1, 2d Ed., Sec. 353 and note.

APPELLEES' BRIEF, LANDSEN & LEEK, ATTORNEYS.

That the ordinance now under consideration is void, for the reason that the same unjustly discriminates between persons belonging to the same class, is, we think, very clearly established by the principles laid down in the following additional cases: *City of Lake View v. Tate*, 33 App. 78; same v. same, 130 Ill. 247; *Yick Wo v. Hopkins*, 118 U. S. 356; *Village of Hyde Park v. Carton*, 132 Ill. 100; *State v. Sheriff of Ramsey County*, 48 Minn. 236; *State ex rel. Garabad v. Dering*, 84 Wis. 585; *Borough of Sayre v. Phillips*, 148 Pa. St. 482; *City of Richmond v. Dudley*, 129 Ind. 112; *City of Shreveport v. Levy*, 26 La. An. 671; *Ex parte Frank*, 52 Cal. 606; *Hayden v. Noyes*, 5 Conn. 391, and *Willard v. Killingworth*, 8 Conn. 247.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

The court below held ordinance No. 513 of the city of Cairo void, and the appellant questions the correctness of this ruling.

The ordinance imposes a license fee of \$100 upon every "wholesale liquor dealer," and defines this branch of the liquor business as the selling or giving away of certain intoxicating drinks in quantities of five gallons or more. The fourth section of the ordinance declares that the ordinance shall not apply to any one holding a valid license under ordinance No. 294 for the sale of liquors in less quantities than one gallon.

There could be no doubt as to the validity of ordinance No. 513, were it not for the fourth section thereof. The city could exact one license fee of those selling in less quantities than one gallon, and another and different fee of those selling in quantities of five gallons or more, without the imputation of favoritism or unjust discrimination. Or, the city could fix a fee of more than \$500 for those selling in any quantities whatever, and a smaller fee for those selling in quantities of five gallons or more, and this classification would be reasonable and within the protection of the law. But in such case the fee for selling in any quantities whatever should be more than \$500, for this amount is the lowest fee authorized by the statutes for sales in less quantities than one gallon, and if no more is exacted for the general privilege, there is, in fact, no fee paid for selling in quantities of five gallons or more.

This it is which constitutes the unjust discrimination. The man who sells in less quantities than one gallon, who is called the retail dealer in the argument of counsel, can not carry on his business as such retail dealer without paying a license fee of at least \$500. Another desiring to sell in quantities of five gallons or more is required to pay \$100 for the privilege, while the same privilege is given to the retailer gratuitously. This is manifestly unfair. Inasmuch as the retail dealer gets what he pays for when he is permitted to carry on the retail business, he should be accorded no more of privilege under the ordinance relating to wholesale dealers than would be extended to a licensed auctioneer or peddler who should desire to engage in the wholesale liquor business.

City of Cairo v. Feuchter Bros.

The two cases relied upon by appellant are not in point. In *Timm v. Harrison*, 109 Ill. 593, it was held to be proper to classify liquor dealers, and to impose different license fees upon the different classes. The classification in that case was undoubtedly a reasonable one. On the one hand were those who sold malt liquors, and on the other hand those who sold stronger drinks. It was the classification of the statute and was held to be authorized by the constitution. No question of unjust discrimination was presented by the facts of the case.

In *Dennehy v. City of Chicago*, 120 Ill. 627, the license fee for selling in quantities of one gallon or more was fixed at \$250, but a distiller licensed for \$500 under another ordinance to sell distilled spirits of his own production at the place of manufacture was exempted from the operation of the ordinance. Here the distinction between the two classes was clearly marked, and no licensees of one class could enjoy the privileges of the other class without paying the license fee therefor.

Neither of the cases above mentioned presents the question which is presented by the case at bar. If the fee fixed by ordinance No. 294 had been more than \$500, then it might be contended, with some degree of force, that a portion of the fee was charged for sales in larger quantities, and that the city had the right to fix a smaller fee proportionally for one who was licensed in both classes, provided he paid some fee for the right in each class, than for one who was a licensee in one class only. But under the ordinance as framed, no part of the fee of \$500 could possibly be applied to sales in quantities of five gallons or more, and the exemption of those holding such a license from liability for the fee imposed upon other wholesale dealers was without authority of law.

We approve the action of the court below in holding ordinance No. 513 void, and in rendering judgment for the defendants. The judgment is affirmed.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS

FIRST DISTRICT—OCTOBER TERM, 1893.

William W. Charles v. Charles F. Remick.

1. PROMISSORY NOTE--*Forged Signatures—Recovery by Estoppel.*—The signing of the partnership name by a person after he has ceased to be a member of the firm and has no authority to make use of such name for any purpose is a forgery, and in an action brought upon such note no recovery can be had except by virtue of an estoppel.

2. SAME—*Bona Fide Indorsee Before Maturity.*—An indorsee of negotiable paper is presumed to have taken the same *bona fide* for full value, and in the usual course of business, before maturity, and no proof is required in the first instance.

3. SAME—*Bona Fide Holder—Fraud—Exception to the Rule.*—If there is fraud or illegality in the origin of a bill or note the knowledge of an innocent holder, of the manner in which it came to his hands, must rest in his bosom, and his means of showing it be much easier than to the drawer or maker; he is, therefore, required to show that he became possessed of it for a sufficient consideration.

Memorandum.—Assumpsit on a promissory note. Error to the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed March 13, 1894.

STATEMENT OF THE CASE.

On the 18th day of February, 1890, one James C. Goldthwaite executed and delivered to the Chicago Trust and Savings Bank, a promissory note for \$2,500, signing the

54	116
156	327
54	116
67	194
54	116
100	1229

Charles v. Remick.

firm name of Ward, Goldthwaite & Co. to said note, and also his own name. This note was made payable to James C. Goldthwaite, and was by him indorsed. Upon the back of this note was indorsed in pencil: "Sold the within described note to W. W. Charles, for \$250, \$2,250 due."

This note was discounted by the Chicago Trust and Savings Bank, and the proceeds paid to the said James C. Goldthwaite. At the same time the said James C. Goldthwaite executed and delivered to the said bank a promissory note for \$3,000, in words and figures as follows, to wit:

"\$3,000.

CHICAGO, Feb'y 18, 1890.

Sixty days after date, we promise to pay to the order of James C. Goldthwaite, three thousand dollars, at Union Trust Bank, Chicago, Ill. Value received; with six per cent interest from date.

WARD, GOLDTHWAITE & Co."

Which note was also indorsed by James C. Goldthwaite.

This note was executed and delivered as collateral security for payment of the first note above named.

The firm of Ward, Goldthwaite & Co. formerly consisted of the said James C. Goldthwaite, Charles F. Remick and William H. Ward. June 10, 1889, there was a dissolution of the firm, James C. Goldthwaite retiring therefrom, but no public notice of such dissolution was given, and the business was carried on in the name of Ward, Goldthwaite & Co., as if no change had been made in the firm. This business was so continued until the 28th day of February, 1890.

D. H. Tolman, president of the Chicago Trust and Savings Bank, who transacted the business with James C. Goldthwaite, testified that he had previously discounted the notes of Ward, Goldthwaite & Co., for the said James C. Goldthwaite, which notes were paid when due.

Tolman further testified that he had no notice that James C. Goldthwaite had withdrawn from the firm.

Tolman, as president of the bank, under an authority set out in the \$2,500 note, sold the \$3,000 note to the plaintiff, W. W. Charles, and the assignee, Charles, brought suit against James C. Goldthwaite, Charles F. Remick and William H.

Ward to recover upon this note. Service was had only on Charles F. Remick, who filed three pleas, to wit:

1st. The general issue.

2d. Plea denying the execution of the note sued on, verified.

3d. Plea denying joint liability, verified.

The cause, by agreement, was tried by the court without a jury, and the court found the issues for the defendant and entered judgment against the plaintiff for costs, from which judgment plaintiff appeals to this court.

The errors assigned are, the court erred in overruling motion for new trial, and in rendering judgment for defendants.

BRIEF OF PLAINTIFF IN ERROR, JOHN G. HENDERSON, ATTORNEY.

A promissory note made payable to the order of the maker and by him indorsed, passes from hand to hand without any other indorsement, and the last holder may bring suit upon the same and recover without filling up the blank indorsement, the law being that "a change from a blank to an indorsement in full is not usually made, and as it is a mere matter of form, it is not required to be done, and the note with the blank indorsement is admissible in evidence in support of the allegation that it was indorsed to the plaintiff by the payee. *Poorman v. Mills & Co.*, 35 Cal. 120, 121; *Moore v. Pendleton*, 16 Ind. 483; *Sterling v. Bender*, 44 Am. Dec. 539; *Abat v. Rion*, 13 Am. Dec. 313; *Bean v. Briggs*, 63 Am. Dec. 464; *Scammon v. Adams*, 11 Ill. 576; *Palmer v. Marshall*, 60 Ill. 289; *Laffin v. Sherman*, 28 Ill. 391; *McDonald v. Bailey*, 14 Me. 101.

When a note is made payable by a firm to one of its members he can not sue the firm on it but if he assigns it, his assignee can. *Young v. Chew*, 9 Mo. App. 389; *Hapgood v. Watson*, 65 Me. 512, 513; *Davis v. Briggs*, 39 Me. 304-307; *Thayer v. Buffam et al.*, 11 Met. 399; *Walker et al. v. Wait et al.*, 50 Vt. 676, 677; *Pitcher v. Barrows*, 17 Pick. 363; *Daniel's Neg. Inst.*, Vol. 1, Sec. 354, p. 302; *Heywood v. Wingate*, 14 N. H. 77, 78; *Smith v. Lusher*,

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5 Cow. 711; Randolph, Com. Paper, Vol. 1, Sec. 404; Gammon v. Huse, 9 App. 562, 563; 100 Ill. 234; Kipp v. McChesney, 66 Ill. 460; Bates on Part., Secs. 883, 884.

BRIEF OF DEFENDANT IN ERROR, BARNUM, HUMPHREY & BARNUM, ATTORNEYS.

When the signing of the firm name by one partner in any transaction, after the partnership is dissolved, is done outside the ordinary course of the firm business, notice of the dissolution is not necessary to the obligee and the contract will be void. Spruck v. Leonard, 7 Brad. 182; Hicks v. Russell, 72 Ill. 230.

The law implies authority of one partner to execute notes, or other commercial paper, only where, from the nature of the partnership, the authority is necessary to the successful carrying on of the business engaged in, or when its exercise is according to usage and custom in partnership enterprises of a like character. Bradley v. Linn, 19 Brad. 322, citing Daniel on Neg. Inst., Sec. 358; and Chitty on Bills, 58.

To render a retiring partner liable on transactions occurring after dissolution because of want of notice thereof, the customer must have been either a regular or recent customer. Block v. Price, 24 Mo. App. 14.

Who is a former dealer and who is not? See 17 Am. and Eng. Enc. 1124, 1125 and 1126.

One who sells to a firm for cash only is not a dealer within the rule. Clapp v. Rogers, 12 N. Y. 283; Merritt v. Williams, 17 Kan. 287.

Nor is one who merely dealt in paper for which the firm was responsible, not procured from it or at its request. Vernon v. Manhattan Co., 22 Wend. 183; City Bank v. McChesney, 20 N. Y. 240; Hutchins v. Bank of Tenn., 8 Humphrey (Tenn.), 418.

And such former dealing must have been within the scope of the agency of the partner with whom it was had in order to confer any rights upon either party. Nussbaumer v. Becker, 87 Ill. 282.

In some cases it has been held that although the holder

did not have actual notice, but by the exercise of proper diligence would have had notice, or where the facts would have put him on inquiry but for his culpable negligence, he can not claim to be a *bona fide* buyer. 1 Bates on Partnership, Sec. 354; New York Fireman's Ins. Co. v. Bennett, 5 Conn. 574; 13 Am. Dec. 109; Cotton v. Evans, 1 Dev. & Bat. Eq. 284; Roth v. Colvin, 32 Vermont, 125; Royal Canadian Bank v. Wilson, 24 Up. Canada, C. P. 362.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Upon the trial of this cause in the Circuit Court, propositions of law were submitted to the court; its holding in respect to these is not complained of; the only insistence of the plaintiff is that the finding of the court was contrary to the evidence.

It appears without dispute that when James C. Goldthwaite signed the name Ward, Goldthwaite & Co. to the note upon which this suit is brought, he had ceased to be a member of that firm, and had no authority to make use of its name for any purpose. The signing by him of that name was a forgery. This action is brought upon a forged signature, and, if a recovery can be had, it is by virtue of an estoppel.

The case is different from what it would be if Remick had, after the withdrawal of Goldthwaite, signed the firm name to a note, and an attempt had been made to hold Goldthwaite thereon. In such case, the business being still carried on by Ward & Remick in the name of the old firm, such signature would not have been a forgery; the question would have been simply whether Goldthwaite was bound by a genuine signature.

In the present case the question is, is the defendant bound by a forged signature of his firm name?

As to all questions of fact presented by the pleadings, the finding of the court is against the plaintiff; this court is called to review the evidence and say, not whether it sustains the finding, but whether it is so inconsistent there-

Charles v. Remick.

with that the conclusion reached by the court below must be overturned; and, in so doing, we must presume that the finding of the Circuit Court upon all disputed matters was such as would tend to sustain its conclusion upon the entire case.

The firm had never had any dealings with Tolman or his bank. Goldthwaite had repeatedly, as in this instance, given for his private purpose the firm note to Tolman, but this was done without the knowledge of Ward or Remick, and was fraudulent as to them.

Under these circumstances that Tolman, who saw Goldthwaite sign the note and gave him a check therefor, had, from the circumstances attending its making, notice that the firm name was being used, not for its benefit, but the private benefit of James C. Goldthwaite, is a conclusion which the evidence sustains.

Neither Tolman nor his bank could have recovered in this case. Can the assignee, Charles?

While it is the case that an indorsee of negotiable paper is presumed to have taken the same *bona fide* for full value, and in the usual course of business, before maturity, and no proof is, in the first instance, required of these things, yet to this general rule there are exceptions.

As: "If the defendant shows that there was fraud or illegality in the origin of the bill or note, a new coloring is imparted to the transaction. The plaintiff, if he has become innocently the holder of the paper, is not permitted to suffer; but as the knowledge of the manner in which it came into his hands must rest in his bosom, and the means of showing it must be much easier to him than to the defendant, he is required to give proof that he became possessed of it for a sufficient consideration. If he is innocent, the burden must generally be a light one; and if guilty, it is but a proper shield to one who would be, but for its protection, his victim." Daniel on Negotiable Instruments, Vol. 1, p. 142 and 662; Kirchoof v. Goezlin, 30 Ill. App. 190; Wright v. Brosseau, 73 Ill. 381; Parsons on Notes and Bills, 128-211.

In the present case it does not appear that the plaintiff paid anything for the note in suit.

Tainted with fraud as it was in its inception, an indorsee or assignee can not recover thereon without proving that he gave a valuable consideration therefor.

There was no evidence as to when or by whom the lead pencil memorandum on the note for \$2,500 was made, or that it was true; it can not therefore be considered.

The judgment of the Circuit Court will be affirmed.

**Economy Furniture Company v. Frank M. Chapman,
Charles C. Chapman and Samuel E. Barr.**

1. **TROVER—Conversion by Warehouseman.**—Where property consisting of a quantity of goods of a like general description, is stored in a warehouse at the same time and in a single lot, a part of which is described in a replevin writ, and another part of the same lot is not so described, so that an exercise of care and responsibility is required to determine and select the articles described in the writ from the others, a warehouseman is not required to take upon himself the risk of making the selection and delivery upon the writ. His refusal to do so does not constitute a conversion of the property.

2. **AGENCY—Facts Constituting—Question of Law.**—It is a question of law as to what facts constitute an agency, but whether the necessary facts exist, is a question of fact.

3. **SAME—Existence of Facts Constituting—For the Jury.**—Where evidence has been admitted tending to show authority in a person to act for another party, such party may have the jury instructed that unless they believe from the evidence such person had such authority, all evidence of his acts and statements should be disregarded.

Memorandum.—Trover. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed March 13, 1894.

E. A. SHERBURNE, attorney for appellant.

APPELLEES' BRIEF, W. L. SNELI AND WILLIAM PRENTISS,
ATTORNEYS.

As a general proposition, there can be no question that the appellees, being warehousemen, would be entitled to a

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lien on goods stored with them for their proper charges. Jones on Liens, Sec. 967; Steinman v. Wilkins, 7 Watts & Serg. (Penn.) 466; Story on Bailments (8th Ed.), Sec. 453; Low v. Martin, 18 Ill. 286; Ill. Cent. R. R. Co. v. Alexander, 20 Ill. 23; Cole v. Tyng, 24 Ill. 99; Hanchett v. First Nat. Bank, 29 Ill. App. 274; 3 Parsons on Contracts (7th Ed.), 267.

It is true that a mortgagor can not subject the mortgaged goods to a lien for their keeping as against the mortgagee without the acquiescence of the mortgagee.

Undoubtedly an implied consent will answer the requirements of the law. Jones on Chattel Mortgages (3d Ed.), Secs. 472, 473 and notes; Hours v. Newcomb (Mass.), 15 N. E. Rep. 123.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellees are warehousemen, and as such received from one Mrs. Sturm a quantity of household furniture for storage in the month of January, 1891.

A part of the goods so stored were covered by a chattel mortgage given by Mrs. Sturm to the appellants, who were furniture dealers, for the unpaid purchase price she had contracted to pay therefor, but that fact was not known to the appellees when they received the goods for storage. At the same time that the mortgaged goods were delivered to the appellees by Mrs. Sturm, other and different goods of a like general description were also delivered by her for storage.

About three days after the appellees received the goods, one Theodore Sonocson called at the appellees' warehouse and had an interview with Mr. Barr, the manager for appellees, of their warehouse, concerning the goods in question.

The assignment of error chiefly relied upon by appellant is the admission of evidence, over its objection, as to what was said and done by Sonocson at the interview referred to.

The action was in trover against the appellees for the conversion by them of the goods.

If the evidence referred to was properly admitted, the jury might properly have found, as they did, that there had been no conversion, and that the appellees were not guilty.

The conversion, if there was any, consisted in the refusal by the appellees to deliver up the goods except upon payment of the storage charges.

Whether they were justified in such refusal depends upon whether there was any arrangement, either express or implied, between appellant and the appellees, whereby, after it became known to appellant that the goods had been stored by the mortgagor with appellees, they should be left on storage with the appellees for the accommodation of the appellant.

It was proved in the case, and it is conceded by appellant, that Sonocson had previously been in the employ of the appellant as a collector, and it was testified to by Barr, on behalf of the appellees, and his testimony on that point is not contradicted, nor was it excepted to, that at the time Sonocson came to the warehouse to inquire about the goods, he exhibited to Barr the chattel mortgage as his authority for making his inquiries.

The witness Barr further testified over the objection of appellant's counsel, to the substantial effect that Sonocson showed the mortgage and notes to witness and asked to see the list of goods as it appeared upon appellee's books, which was then shown him, and that he then said the goods were all there, and told the witness to keep them, and that unless Mrs. Sturm, the mortgagor, should pay her notes as they fell due they would come and get the goods. Barr also testified that Sonocson asked what the storage charges were, and that he showed him on the books what the storage and cartage charges amounted to at that time. He further testified that Sonocson came to the warehouse once or twice afterward, but that he never demanded the goods or said anything about taking them.

About three months later a replevin suit was begun before a justice of the peace, for the goods, and what is claimed to

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be a refusal by the appellants to deliver the property in response to a demand made upon the replevin writ then occurred. That suit was dismissed for lack of jurisdiction in the justice of the peace, and this suit in trover was then begun without any further effort to obtain the property.

As to what occurred when the demand on the replevin writ was made, there is a direct conflict in the testimony. Even the witnesses for the appellant do not agree, and if the jury believed the testimony on the part of the appellees and did not credit that in behalf of the appellant, they correctly came to the conclusion that appellees had not refused to deliver up the property, and hence that there was no conversion.

Where, as was shown on behalf of the appellees, property, consisting of a quantity of goods of a like general description, is stored in a warehouse at the same time and in a single lot, a part of which is described in a replevin writ, and another part of the same lot is not so described, so that an exercise of care and responsibility is required to determine and select the articles described in the writ from the others, a warehouseman is not required to take upon himself the risk of making the selection and delivery upon the writ. His refusal to do so does not constitute a conversion to his own use of the property demanded.

Barr, one of appellees' witnesses, testified that he had handled the goods several times; that they were all stored together; that some of them not covered by the mortgage were like those described in it; that the difference was in the finish, some mahogany finish and some antique finish, and that he could not distinguish between one bed bought of the Economy Furniture Company, and another bed that Mrs. Sturm claimed as her own.

The appellee Frank M. Chapman testified that he offered the persons who came with the writ all the goods if they would pick them out; that the goods were mixed with a lot of other household goods belonging to the mortgagor, and that his firm could not select them, and would not take the responsibility of selecting them; that he told the parties

having the writ that his firm would afford them all available facilities to select the goods from the pile, but that the parties were afraid to take the responsibility and declined to select the goods; that appellees insisted upon being paid the storage charges, but told the persons having the writ that if they declined to pay and would not do so, they might take the goods if they could pick them out, but they insisted upon appellees picking them out, and refused to do it themselves.

It is true that appellant's witnesses testified to a different course of conduct and conversation on that occasion, and one which, if credited by the jury, would have led to a necessarily different result, but the jury saw and heard the several witnesses, and had the right to give credence to one or more of them, and to discredit others. We refer particularly to the evidence on the part of appellees only, for the purpose of showing that if the jury relied upon that as being the truth of the case, as they evidently did, their conclusion of not guilty was justifiable.

Of course, if the testimony of Barr concerning the conduct and conversation of Sonocson was properly admitted, then the jury were further justified in arriving at the conclusion that appellees had not been guilty of a conversion of the goods. If Sonocson was the constituted agent of the appellant, to look after furniture which appellant had sold in the course of its business of selling household goods upon the installment plan, and upon which it held chattel mortgages for the unpaid part of the purchase price, there can be no doubt but that such employment would carry with it the authority to him to incur incidental and necessary charges for storage. And having that authority, the proof need not be strong that, finding the mortgaged goods in a warehouse and leaving them there, he did obligate his principal to pay reasonable storage charges, so long as they might remain in the warehouse.

Although it is a question of law as to what facts constitute an agency, yet whether the necessary facts exist upon which an agency may be based, is a question of fact for a jury to determine.

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It was proved and is admitted, that Sonocson worked as collector for appellant for three or four years prior to May 1, 1890. Whether he was employed by appellant in January, 1891, at the time he called at the warehouse and inquired about the goods in question, was a question upon which the evidence was conflicting.

Mr. Eiffert, the manager of the appellant corporation, testified in rebuttal upon that question in answer to the counsel for appellant, as follows:

Q. "Mr. Eiffert, was Theodore Sonocson in the employ of the Economy Furniture Company as late as January 1891? A. No, sir.

Q. If he was ever in the employ of the company and left it, when was it? A. He left on the first of May, 1890."

And on cross-examination, in response to the question, "How is it that you remember so sure about this business now, when you were greatly in doubt about it this forenoon; then you did not know whether he was in your employ or not?" he answered, "Because I looked up his pay roll. I did not want to swear to anything that I did not know positively. I went back to the office and looked when he quit."

When first called as a witness in chief for appellant, Mr. Eiffert testified on cross-examination, as follows:

Q. "Did you have a man working for you in your employ at that time by the name of Theodore Sonocson? A. I don't think so. He was one of our collectors.

Q. He was one of the men in your employ? A. Yes, he was collecting for us about three or four years, but I don't think he was working for us at that time.

Q. I will ask you if he was not your collector at that time? A. We had two collectors.

Q. And if you didn't send him to Chapman Bros., before you went there? A. No, sir.

Q. Are you sure about that? A. He probably had it on his route, but not to my knowledge. I went to Chapman Bros. and saw Mr. Barr myself.

Q. You are sure you saw him? A. Yes, sir.

Q. Now, I will ask you if the fact is that you sent this

Theodore Sonocson there and he came back and told you what took place there? A. Probably that was on his route. Mr. Barr didn't say that there was anybody else in there after the goods. Probably he afterwards was there."

The evidence on the part of appellees as to Sonocson's employment by appellant, outside of his own statements, consisted of the uncontradicted fact testified to by Mr. Barr, that Sonocson came to the warehouse two or three times concerning the goods in question, and that on the occasion of his first visit he had in his possession the chattel mortgage to the appellant, and exhibited it as his authority to make inquiries about the goods.

We are not prepared to say that the jury, in considering the uncertainty of the testimony of Mr. Eiffert when first examined, and that his more positive testimony in rebuttal was based wholly upon what appeared on a pay roll that was not produced, were not justified in finding that the fact of Sonocson having the mortgage in his possession, was the better evidence of his employment by appellant at that time.

With such a finding of employment by appellant, Sonocson's statements and directions to Barr about the keeping and storage of the furniture, were competent evidence, and made the appellant liable for the storage charges, and it was no conversion by appellees to demand, if they did so, prepayment of the storage charges as a condition of their delivery up of the furniture.

Evidence having been admitted that tended to show authority in Swanson to act for the appellant, the appellant might, if it had so desired, have had the jury instructed that unless they believed from the evidence he had such authority, all evidence of his acts and statements should be disregarded.

It is further urged that it was error for the court to instruct the jury to find the defendant Barr not guilty.

It appeared in the evidence beyond dispute that Barr was a mere employe of the appellees, refusing to act except as they might direct, and being such it was entirely proper for

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the court to instruct that for mere non-feasance he be found not guilty.

Moreover, the record does not sustain the statement in the abstract prepared by the appellant that "to the giving of which last instruction (referring to the one to find Barr not guilty), the plaintiff then and there duly excepted."

The record itself shows, immediately following the close of the evidence, as follows :

"And thereupon the court instructed the jury as follows :"

Then follow three instructions without any statement as to who they were offered by, or in whose behalf they were asked or given, or whether they were given on the court's own motion, and following the third instruction occur the words :

"Excepted to by plaintiff."

The third instruction was the one directing the jury to find Barr not guilty.

If inferences were to be indulged in, we might say from the fact that the first two instructions are favorable to the side of the plaintiff, that they were offered by the plaintiff, and that the third one was not offered by the plaintiff because of the fact that it was unfavorable to that side, in directing the jury to find Barr not guilty. But it is only by inference that it may be so said.

Such an exception is too uncertain both as to what was excepted to and when.

It is quite plain that neither of the three instructions offered to were offered by the defendants, for it appears on that several instructions were offered by the defendants, all of which were refused to be given.

It does not appear that any instructions asked by the plaintiff were refused, and the unidentified instructions which were given, presented the law of the case in fully as favorable an aspect as the plaintiff was entitled to.

We fail to find in the record any sufficient error to justify a reversal of the judgment of the Circuit Court, and it will therefore be affirmed.

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Chicago & Alton Railroad Company v. William H. Davis.

1. COMMON CARRIERS—*Perishable Goods*.—If a carrier undertakes to carry perishable property in vehicles specially adapted to preserve that kind of property, he becomes responsible for defects in such vehicles, if damage results.

2. INTEREST—*On Damages for Injuries to Property*.—On assessing damages for injuries to personal property, it is error to allow interest on the amount of damage found.

Memorandum.—Action against a common carrier for loss of goods. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1894, and affirmed if the appellee remits, etc., otherwise reversed and remanded. Opinion filed May 28, 1894.

The opinion states the case.

APPELLANT'S BRIEF, LEE & HAY, ATTORNEYS.

Under the proof and facts in the case, the defendant is not liable for any damages arising from the defect in the refrigerator car used in the shipment and transportation of the goods for the damage to which this suit is brought.

Appellant's common law liability as insurer was waived. *Field v. C. & R. I. R. R.*, 71 Ill. 459; *Witting v. St. L. & S. F. Ry.*, 101 Mo. 631.

Where the shipper himself undertakes a part of the duties which would otherwise devolve upon the carrier, or has negligently performed his undertaking with respect to the carriage, and loss results, the blame rests upon the shipper, and not upon the carrier. *Lawson, Contracts of Carriers*, Sec. 23; *Hutchinson on Carriers* (Mechem's Ed.), Sec. 216; *Baldwin v. London, C. & D. Ry.*, Law Reports, 9 Q. B. Div. 352; *Betts v. Farmers L. Co.*, 21 Wis. 84; *Milwaukee v. C. & N. W. R. R.*, 37 Wis. 194; *Ross v. Troy & Boston R. R.*, 49 Vt. 364; *Richardson v. Great North. Ry.*, Law Repts., 7 C. P. 74; *Harris v. North Ind. R. R.*, 20 N. Y. 232; *Lee v. Ralston & Ga. R. R.*, 72 N. C. 234.

As where, without carrier's knowledge, the owners of a

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horse in loading, left a car-window opened, through which the horse escaped and was killed. *Hutchinson v. R. R.*, 37 Minn. 524.

And where the owner chose to have car door left unfastened, and assuming the responsibility, loss resulted. *Roderick v. R. R.*, 7 W. Va. 54.

And where the car door was left open, and carrier not notified. *Newby v. C., R. I. & P. R. R.*, 19 Mo. App. 391.

It is sufficient to charge the shipper that he himself was negligent. *Lawson*, Contracts of Carriers, Sec. 3, pp. 5 and 6; *White v. Winnisimmet Co.*, 7 Cush. 155; *Baldwin v. London C. & D. R. R.*, Law Repts. 9 Q. B. Div. 582; *E. Tenn. R. R. v. Whittle*, 27 Ga. 535; *Kimball v. Rutland R. R.*, 26 Vt. 247; *L. B. & W. Ry. v. Murray*, 72 Ill. 128.

The rule of law is that a party can not recover if his own negligence was as much the cause of the loss as that of the defendant. *C. & N. W. R. R. v. Van Dresar*, 22 Wis. 511.

At common law, interest was not allowed in any case; authorized only by statute. *Am. & Eng. Ency. of Law*, Vol. 11, p. 380; *Sammis v. Clark*, 13 Ill. 544; *Aldrich et al. v. Dunham et al.*, 16 Ill. 403; *I. C. R. R. Co. v. Cobb et al.*, 72 Ill. 148; *City of Chicago v. Allcock*, 86 Ill. 384; *Hamer et al. v. Kirkwood et al.*, 25 Miss. 95; *Frazer, Excr., v. Boss*, 66 Ind. 17; *Carruthers, Excr., v. Andrews*, 42 Tenn. 381; *Close v. Fields*, 2 Texas, 232; *H. & T. R. R. v. Muldrow*, 54 Texas, 233.

Interest on damages for injuries to property not within the statute. *I. C. R. R. v. Cobb et al.*, 72 Ill. 148; *T., P. & W. Ry. v. Johnson*, 74 Ill. 83; *City of Chicago v. Allcock*, 86 Ill. 384; *D., S. P. & P. R. R. v. Conway*, 8 Colo. 1; *Kinney v. Han. & St. Jo. R. R.*, 63 Mo. 98; *Kimes v. St. L., I. M. & S. Ry.*, 85 Mo. 611; *Weir v. Allegheny Co.*, 95 Pa. St. 413.

APPELLEE'S BRIEF, EASTMAN & SCHUMACHER, ATTORNEYS.

The general rule is that the plaintiff makes out a *prima facie* case by showing delivery of goods and loss, and the burden of proof is upon the railroad to show its exemption

from liability. I. C. R. R. v. Cowles, 32 Ill. 16; C. & R. I. R. R. v. Warren, 16 Ill. 502; Coles v. L. E. & St. L. R. R., 41 Ill. App. 607; Adams Ex. Co. v. Stettauers, 61 Ill. 184; O. & M. R. R. v. Emrich, 24 Ill. App. 245; Western Trans. Co. v. Newhall, 24 Ill. 466; Davis v. W., St. L. & P. R. R., 89 Mo. 340; Shriver v. S. C. & St. P. R. Co., 24 Minn. 506.

Nor is the law as to perishable freight different in regard to the burden of proof; exemptions arising from the vitality of the goods must be shown by the carrier. C., R. I. & P. R. R. v. Harmon, 12 Ill. App. 54; T. W. & W. R. R. v. Hamilton, 76 Ill. 393; Read v. H. L. Kas. C. & N. R. R., 60 Mo. 199; L. & N. R. Co. v. Wynn (Tenn.), 14 S. W. R. 311; Hutchinson on Carriers (Melham Ed.), Sec. 125, 765; 3 Am. and Eng. Enc. of Law, 165.

If appellant's common law liability was waived, yet its liability for damages arising from negligence could not be waived. Ill. C. R. R. v. Joute, 13 Brad. 424; I. C. R. R. v. Morrison, 19 Ill. 136; Oppenheimer v. U. S. Ex. Co., 69 Ill. 62; McFadden v. Mo. Pac. Ry. Co., 92 Mo. 343; 2 Am. & Eng. Enc. of Law, 822; Hutchinson on Carriers (Mechem Ed.), Sec. 290a.

The carrier is bound to furnish safe and suitable vehicles. Am. and Eng. Ency. of Law, Vol. 3, p. 16a; Hutchinson on Carriers (Mechem Ed.), Secs. 292, 293; I. B. & W. Ry. Co. v. Strain, 81 Ill. 304; St. L. & S. E. Ry. v. Dorman, 72 Ill. 304.

Refrigerator cars if the goods are of such a nature as to require it. Beard v. Ill. Cent. R. R., 7 Lawyer's An. R. (Iowa) 280; M. D. & T. Co. v. Cornforth, 3 Col. 280; Hutchinson on Carriers, Sec. 295a, 295b.

He is required to make an examination of his vehicle before commencing the journey to see whether or not it is defective, and if he fails to do this he is negligent. Hutchinson on Carriers, Secs. 331, 332; I. B. & W. R. v. Strain, 81 Ill. 304.

The carrier is liable even though the cars are seen by the shipper and known by him to be defective. Potts v. Ry. Co., 17 Mo. App. 393; Mason v. M. P. Ry. Co., 25 Mo. App. 473; Swan v. St. L., K. & N., 38 Mo. 229.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

There is no substantial difference between the parties as to facts or law, but only which part of the law applies to the facts.

The appellee bought, through agents, a carload of green hams from the Armour Packing Company at Kansas City, to be shipped by that company from Kansas City to Cincinnati.

The course of business required the hams to be shipped in a refrigerator car.

The appellant received the hams in a refrigerator car sent by the railroad company to the packing house of the Armour Co. to be loaded. The hams began to spoil on the route, because there was a defect in an inside door of the car—a strip torn off—which permitted outside warm air to go in.

The course of business between the railroad company and the Armour Co., was, that the railroad company inspected the sufficiency of the car as a vehicle to run on the road, and that the Armour Co. inspected the refrigerating features. The defect was not visible from the outside of the car. Had there been no such defect, the hams would not have been injured.

To such facts the general law of the exemption of a carrier from damage caused by inherent tendency of the goods has no application. Either the appellant or the Armour Co. are responsible, and perhaps both are; but if both are responsible, the double responsibility presents no obstacle to an action against either.

The railroad company is clearly responsible to the appellee, unless as between him and the railroad company—not as between the railroad company and the Armour Co. merely—the inspection of the refrigerator features of the car, or the risk of insufficiency of those features, was the duty or risk of the Armour Co. In general, it must be conceded that the shipper or owner of the goods has no concern with the vehicle of the carrier.

If a carrier undertakes to carry perishable property in

vehicles specially adapted to preserve that kind of property, he becomes responsible for defects in such vehicles, if damage results. The authorities go much farther. See cases collected in *Beard v. Ill. Cent. R. R.*, 79 Iowa, 518.

And without evidence there is no presumption that the Armour Co. had any authority to diminish the obligation of the railroad company to the appellee. *Merchants Despatch T. Co. v. Joesting*, 89 Ill. 152.

In assessing damages some items of expense are allowed which would have been the same if there had been no injury to the hams; and interest on the loss was also allowed. The latter is contrary to the doctrine laid down in *Ill. Cent. R. R. Co. v. Cobb*, 72 Ill. 148.

These items, with the interest, amount to \$272.78, which being deducted from the judgment, leave \$778.68 as the amount for which the judgment will be affirmed, if the appellee remits the \$272.78. Otherwise the judgment will be reversed and the cause remanded. In either event the costs fall on the appellee. *Kan. & Sen. R. R. v. Horan*, 30 Ill. App. 552. Remittitur filed. Affirmed May 31, 1894.

James B. Clow and James M. Johnson v. James H. Gilbert, Sheriff.

1. **JUSTICE OF THE PEACE**—*Jurisdiction Depends upon the Statute.*—The jurisdiction of a justice of the peace depends upon the statute, and it is acquired only in pursuance of it.

2. **REPLEVIN**—*An Order for a Return of the Property, no Suit on the Bond.*—Where there is no order for a return of the property on the dismissal of a replevin suit, there can be no recovery of damages for the taking or detention of the property, by a suit on the bond.

3. **SAME**—*Order for a Return of the Property.*—In actions of replevin to obtain possession upon a justice of the peace, there must be an affidavit containing all the requirements of the statute.

4. **SAME**—*If a Justice is a Court of Record, no Order for a Return of the Property.*—In the absence of a return of the property, the justice has no jurisdiction, and can not make a writ of *certiorari*. All he can do is to dismiss the suit.

Clow v. Gilbert.

5. **SAME—Sufficiency of the Affidavit.**—It is a material averment of an affidavit in replevin that the property has not been seized under any execution or attachment against the goods and chattels of the plaintiff liable to execution or attachment. An affidavit in a replevin suit containing no such averment, is insufficient.

6. **EXECUTION LIEN—Not Lost by a Wrongful Taking.**—The lien of an execution or writ of attachment is not lost if the goods levied on are wrongfully taken from the possession of the officer.

7. **REPLEVIN BOND—Suit on, Not the Only Remedy.**—The rule that a suit on a replevin bond is the only remedy of the defendant in a replevin suit has been applied only to the case of a replevy, at the suit of a tenant, of goods distrained for rent by the landlord.

MR. JUSTICE GARY, dissenting.

Memorandum.—Appeal from the Circuit Court of Cook County: the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed May 28, 1894.

The opinion states the case.

APPELLANTS' BRIEF, KNIGHT & BROWN, ATTORNEYS.

Appellants contended that there is no foundation for a suit in trover in this case.

One of the requisites of a suit in trover is that the right of the property and the right of the immediate possession thereof be in the plaintiff. This rule is so elementary in its character that the citation of authorities in its support is not necessary. Such being the rule of law, this essential element in appellee's case is not present. *Montgomery v. Bush*, 121 Ill. 523; *Vinyard v. Barnes*, 124 Ill. 347; *Clark v. Norton*, 6 Minn. 418; *Owens v. Weedmann*, 82 Ill. 409.

The appellee herein has no more right to the goods in question now than he had after the replevin writ was served and the goods delivered, at which time he had no more than a right to take possession at some future time, viz., when the court awarded them to him by a writ of *retorno*.

It is not enough to maintain trover that it be merely a right in action or a right to take possession at some future time. *Cooley on Torts*, 445.

The judgment rendered on the replevin bond is a bar to this suit. *Shepard v. Butterfield*, 41 Ill. 79.

Courts should take care not to tempt persons to try experi-

ments in one action, and when they fail to suffer them to bring other actions for the same demand. The plaintiff who brings a second action ought not to leave it to nice investigation to see whether the two causes of action are the same. He ought to show beyond all controversy that the second is a different cause of action from the first, in which he failed. Herman on Estoppel, Secs. 211, 212, 229, 256; Seldon v. Tutop, 6 T. R. 607; White v. Simonds, 33 Vt. 178; Day v. Vallette, 25 Ind. 42; Kreuchi v. Dehler, 50 Ill. 176.

The sheriff, being but the qualified owner or custodian of the goods, can not maintain trover for their conversion. He has no remedy but on the replevin bond. Bruner v. Dyball, 42 Ill. 34; Speer v. Skinner, 35 Ill. 282.

APPELLEE'S BRIEF, ARND, EVANS & ARND, ATTORNEYS.

The suit on the replevin bond is no bar to the action in trover. Atchison, etc., R. Co. v. Commissioners, 12 Kan. 135; Merrin v. Lewis, 90 Ill. 505.

There is foundation for the suit even if no *retorno habendo* was awarded in the replevin suit. Evans v. Bouton, 85 Ill. 579; Rev. Stat. of Ill., Chap. 119, Sec. 4; Cobbey on Replevin, p. 689, Sec. 1209; Wells on Replevin, p. 413, Sec. 766; Vogel et al. v. The People, 37 Ill. App. 388; Bruner v. Dyball, 42 Ill. 34; Cobbey on Replevin, p. 661, Sec. 1159; Howitt v. Estelle, 92 Ill. 218; Simpson v. Wren, 59 Ill. 222; Mead v. Miller, 78 Ill. 62.

A sheriff can maintain trover for conversion of goods on which he has levied; he is not confined to his remedy on the replevin bond. Melheiser v. Lane, 82 Ill. 117; Atkins v. Moore, 82 Ill. 239; Eisendrath v. Knauer, 64 Ill. 491; Berthold v. Quirk, 68 Ill. 297; Owings v. Kneadman, 82 Ill. 409; 1 Chitty, Pleadings, p. 149; Bradwell v. Paradise, 81 Ill. 474; Wilbraham v. Snow, 2 Saund. 47a; Burkle v. Luce, 1 N. Y. 163.

A defendant in a replevin suit is not confined to his remedy on the bond; in other words, "His remedy on the replevin bond is not exclusive." Bruner v. Dyball, 42 Ill. 34.

The mere taking possession of property under a writ of replevin by the plaintiff herein does not affect the ownership thereof; that can only be determined by trial and the judgment of the court; so if the plaintiff in replevin, after having obtained possession of the property of another, dismisses his suit without a trial upon the merits, the owner may maintain trover or replevin against him and have the right determined. His remedy upon the replevin bond is not exclusive. *Bruner v. Dyball*, 42 Ill. 34; *Howitt v. Estelle*, 92 Ill. 218.

A person claiming to own property should not be permitted to get possession by fraud and then refuse to restore it, because he claims to own it. *Simpson v. Wren*, 50 Ill. 222; *Mead v. Miller*, 78 Ill. 62.

Without an affidavit, the magistrate has no power to act. From it, he obtains his jurisdiction and it must contain all the statutory requirements. *Evans v. Bouton*, 85 Ill. 579.

Trespass or trover lies at the suit of a sheriff or constable who has seized goods on execution against a wrongdoer. If an officer reduces personal property to possession by a levy under an execution, and any one dispossesses him, he may recapture it or recover the value of his special interest in it, in an action of trover. *Melheiser v. Lane*, 82 Ill. 117; *Atkins v. Moore*, 82 Ill. 240.

It is the recognized law that a person having a special property in goods, as a sheriff, carrier, warehouseman, pawnee, trustee, etc., or any person who is responsible over to his principal, may maintain trover against a stranger who takes them out of his actual possession. *Eisendrath v. Knauer*, 64 Ill. 401; *Berthold v. Quinlan*, 68 Ill. 297; *Owens v. Weedman*, 82 Ill. 409; 1 *Chitty on Pleadings*, 149.

By the seizure of goods under execution, the sheriff acquired a special property in them, and may maintain an action of trespass or trover against any one who wrongfully takes them away. *Bradwell v. Paradise*, 81 Ill. 474; *Wilbraham v. Snow*, 2 Saund. 47a.

Where property is levied on by virtue of an execution, is replevied and the replevin suit abates the lien, and execution

revive and the sheriff may retake it by virtue of the former levy. *Burkle v. Lucè*, 1 N. Y. 163.

A party having a special property in articles replevied, is entitled to recover against a stranger having no interest therein, not merely to the extent of his special, but to the full value of the property, and the excess beyond his special interest, he will hold in trust for the general owner. *Atkins v. Moore*, 82 Ill. 240.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court, rendered there upon a trial had upon an appeal from a judgment rendered by a justice of the peace.

Appellants had, in an action of replevin begun before a justice of the peace, taken away from the possession of appellee certain property; that action of replevin had been dismissed by the justice, but no writ of *retorno* had been awarded. Appellants not having returned the property it was demanded from them by appellee and upon their refusal the present action was brought.

The principal contention of appellants is, that no writ of *retorno* having been issued by the justice, the present action can not be maintained.

The justice of the peace had no jurisdiction of the action of replevin brought by appellants, either to proceed with the suit or to issue a writ of *retorno*; the justice could, in that action, only do what he did—dismiss the suit; because the affidavit filed by appellants was insufficient to authorize the bringing of an action of replevin. The statute concerning replevin provides that before the writ issues the person bringing such action shall file an affidavit showing, among other things, that the property described in the writ and about to be replevied has not been seized under any execution or attachment against the goods and chattels of the plaintiff liable to execution or attachment; the affidavit filed by appellants contained no such averment; it therefore was insufficient to authorize the issue of the replevin writ. The

Clow v. Gilbert.

jurisdiction of a justice of the peace not only depends upon the statute, but it is acquired only in pursuance of the statute. While it is perhaps the case that having inadvertently or mistakenly issued a writ of replevin upon an insufficient affidavit, the justice might permit such affidavit to be amended, and after amendment proceed with the cause, yet he would not have jurisdiction to proceed with the cause and render a binding judgment therein, until an affidavit in accordance with the statute was filed. No amended affidavit was filed, and the justice being without jurisdiction to do otherwise than dismiss the suit, could not award a writ of *retorno*.

The opinion of Judge Adams, before whom the cause was tried, states the facts and the law clearly. It is as follows :

JAMES H. GILBERT	}	In the Circuit Court of Cook County. Opinion of the Hon. Francis Adams.
VS.		
CLOW ET AL.		

This is an appeal suit which was tried by the court, a jury being waived by the parties. The facts appearing in evidence are as follows :

1. March 30, 1892, a writ of attachment issued out of this court at the suit of James B. Clow, Will E. Clow and James M. Johnson (doing business under the firm name of James B. Clow & Son) against one Wm. T. Woodley. The sheriff made a return of the writ, dated April 15, 1892, showing that March 30, 1892, he served the writ by levying on the interest of Woodley in certain goods and chattels mentioned in the return, among which are nine enameled bath tubs and stands, and nine bath covers. The return also states that the nine bath tubs, stands and covers were taken from the sheriff by constable John Noonan on a writ of replevin, issued by Justice Glennon, April 2, 1892.

March 28, 1892, a writ of attachment issued out of this court at the suit of the J. L. Mott Iron Works against the said Woodley. The sheriff's return to this writ, of date April 15, 1892, shows a levy made March 28, 1892, on the same goods and chattels levied on in the first mentioned attachment suit. The last mentioned writ was the first

levied. The returns on both writs are substantially the same.

2. April 2, 1892, a writ of replevin was sued out of Justice Glennon's court by James H. Clow, Will E. Clow and James M. Johnson (composing the firm of James B. Clow & Son) against James H. Gilbert, the plaintiff in this suit, and Woodley, to recover nine bath tubs and rims. The affidavit for the writ was made by James M. Johnson, one of the defendants in this suit. The constable's return on the writ of date April 2, 1892, shows that he executed it by taking the property thereon described and delivering it to the plaintiffs in the writ and by reading, etc. The writ was returnable April 8, 1892, but the suit was continued by the justice from time to time till May 9, 1892, when it was dismissed. There was no order or judgment for a return to the defendant of the replevied property. June 11, 1892, James H. Gilbert and Woodley sued out a summons in Justice Glennon's court against James Clow, Will E. Clow, James M. Johnson and Clarence Knight on a demand for \$200. The summons was returnable June 17, 1892, but was continued then, and from time to time until July 15, 1892, when it was dismissed on motion of the plaintiffs. It was assumed on argument that the last mentioned suit was on the replevin bond, but there is nothing in the record to show what was the subject-matter of the suit.

May 29, 1893, James H. Gilbert, the sheriff, sued out a summons from George P. Foster, a justice of the peace, against James B. Clow and James M. Johnson on a demand not exceeding \$200. The summons was returnable June 6, 1893, on which date a change of venue was taken to Justice Everett, and such proceedings were had that June 17, 1893, a judgment was rendered for the plaintiff for \$200, from which judgment the present appeal was taken. The suit was tried as in trover, both in the justice court and here.

It was proved on the trial that prior to the commencement of the suit, demand was made on the defendant, Johnson, for the goods in question, in response to which he said his firm had sold them. The plaintiff relies on the legal

possession of the sheriff, as shown by the attachment writs and the returns thereof, upon the demand and refusal above mentioned, and upon the wrongful taking of the goods in the replevin suit. The defendant offered no evidence of ownership of the property and relies on the supposed weakness of the plaintiff's case. Several questions of law have been raised on the argument and elaborately argued. It is claimed by the defendant's counsel that the plaintiff's remedy is limited to a suit on the replevin bond; that this is his exclusive remedy. There was no order for a return of the property on the dismissal of the replevin suit, and it is admitted that, in the absence of such order, there can be no recovery of damages for the taking or detention of the property, on a suit on the bond, so that a suit on the bond would be practically ineffective. To this proposition, defendant's counsel ingeniously reply that it must be presumed that the justice, under Sec. 22 of the Replevin Act, found that the plaintiff, pending the suit, had become entitled to the possession of the property, citing *Vineyard v. Barnes*, 124 Ill. 346.

There would be some force in this argument, if it appeared that the justice had jurisdiction, but an examination of the affidavit in the replevin suit shows that he had not. It is a material averment in an affidavit in replevin that the property has not been seized under any execution or attachment against the goods and chattels of the plaintiff, liable to execution or attachment. The affidavit in the replevin suit contains no such averment. The averment, apparently substituted for the required statutory averment, is that the property had not been seized under any execution or attachment against the goods and chattels of William T. Woodley, which is not only insufficient, but contrary to fact. In order to confer jurisdiction on the justice, there must be an affidavit containing all required by the statute. *Evans v. Bouton*, 85 Ill. 579-581.

In the absence of such an affidavit, he had no jurisdiction, and could not order or issue a writ of *retorno*. All he could do was to dismiss the suit. *Vogel v. The People*, 37 Ill. App. 388.

How, then, stands the case? The sheriff, the plaintiff in the case, was lawfully in possession of the goods, by virtue of his levy of the writ of attachment, and had a special property therein; the defendants, under color of legal process, issued in a case in which the justice had no jurisdiction, wrongfully obtained possession of the goods. There can be no recovery of damages for the wrongful taking or detention of the property by suit on the bond, and if defendant's contention, that the only remedy is by suit on the bond, is correct, the plaintiff is practically without remedy. Defendant's counsel rely on the case of *Speer v. Skinner*, 35 Ill. 282, in which it was decided that property distrained for rent, having been replevied by one claiming to be the general owner, the lien of the distrainer, or landlord, is lost, and he has no remedy but on the replevin bond. (Ib. 303.)

It is not true, however, that the lien of an execution or writ of attachment is wholly lost if the goods levied on are wrongfully taken from the possession of the sheriff.

Burkle v. Luce, 1 N. Y. R. 163, was a case similar to the present in some of its respects. These goods, previously levied on by the sheriff, were taken from him by replevin. The replevin suit abated by the death of the plaintiff, and, as in this case, the circumstances were such that the sheriff could have no remedy by suit on the bond. The court held that on the abatement of the replevin suit, the lien of the execution was revived, and the sheriff might retake the goods. The rule that a suit on the replevin bond is the only remedy of the defendant in the replevin suit has, so far, been applied only to the case of a replevy at the suit of a tenant, of goods distrained for rent by his landlord, and I do not feel called upon to extend that rule so as to include the present case, and thus leave the plaintiff without remedy. Section 19 of the Bill of Rights, declares that "every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive to his person, property or reputation." If the plaintiff is entitled to recover, the measure of damages is the full value of the property. *Broadwell v. Paradise*, 81 Ill. 474; *Atkins v. Moore*, 82 Ill. 340.

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The defendant's affidavit in the replevin suit states the value of the property to be \$200, and as he, with the other plaintiffs in that suit, had to give bond in double the value of the property, it is not to be presumed that he fixed too high a value on it. The court finds the defendants guilty, and assesses the plaintiff's damages at the sum of \$200. The judgment of the Circuit Court is affirmed.

MR. JUSTICE GARY.

I concur in affirming the judgment, but not in the reasons for so doing. I admit that the affidavit on which the writ of replevin was issued was bad, but not that as a consequence the justice was without jurisdiction. Affidavits in replevin and complaints in forcible detainer, are, by the Supreme Court, put upon the same footing, even when the suits are begun before a justice. *Evans v. Bouton*, 85 Ill. 579; and if defective may be amended. *Snowell v. Moss*, 70 Ill. 313; *Thompson v. Sornberger*, 78 Ill. 363.

But if amenable, such affidavits and complaints are, if defective, only voidable—not void collaterally. *Durham v. Heaton*, 28 Ill. 264; *Maynard v. People*, 135 Ill. 416; *Johnson v. Miller*, 50 Ill. App. 60.

Defects may be waived by conduct even if not amended. *Center v. Gibney*, 71 Ill. 557.

A complaint in bastardy, "insufficient to justify the issuance of a warrant," which does "not show probable cause," is amendable, and if not amended, and an examination before a justice ensues, the defendant may commit perjury by falsely denying carnal intercourse. *Maynard v. People*, 135 Ill. 416.

The dismissal of the suit by the justice was a non-suit. *McKinney v. Finch*, 1 Scam. 152.

Bruner v. Dyball, 42 Ill. 34, is an authority for this suit. If it be not consistent with *Blair v. Ray*, 103 Ill. 615, and *Vineyard v. Barnes*, 124 Ill. 346, followed by us in *Matson v. Davies*, 35 Ill. App. 78, that is not our affair. *National Bank v. Jennings Tr. Co.*, 44 Ill. App. 285.

But there may be no inconsistency. On direct review, error assigned must be made to appear affirmatively, or it

will be overruled. But a judgment is not evidence "of any matter to be inferred by argument from the judgment." *Duchess of Kingston Case*, 20 Howell State Trials, 355, 538; Smith L. C., 1998.

Apply that rule here. The justice should, on the dismissal of the replevin suit, have awarded a return of the property, unless in the meantime the plaintiff had become entitled to the possession of it. Sec. 22, Ch. 119, Replevin.

He did not award a return, *ergo*, the plaintiff had become entitled. That inference is not evidence.

As, after obtaining the property on the replevin writ, and before the commencement of this suit, the appellants converted the property to their own use, they must justify that conversion or pay for the property.

MR. PRESIDING JUSTICE SHEPARD.

I conceive that although a defective affidavit in replevin, being amendable, may confer jurisdiction upon the justice to issue the writ, yet, that, the affidavit not being amended, the justice became ousted of his jurisdiction to award a *retorno*, or do anything in the cause except to dismiss the suit, and therefore I concur in the opinion of Mr. Justice Waterman.

Max Hecht et al. v. E. Feldman.

1. PRACTICE—*When a Court Acquires Jurisdiction Over the Person—Trial, When.*—As soon as the parties to a cause are brought or come into court, it has personal jurisdiction over them, and may, with their consent, proceed at once to try their cause. The fact that a case is brought to a certain term, that is, where the summons is made returnable at that term, does not deprive the court of jurisdiction to try the cause at a previous term, if all parties consent to such proceeding.

2. SAME—*Defendant's Right to be Heard on Motions.*—A defendant may, as soon as suit has been brought against him, appear therein, and is then entitled to be heard upon such motions as he may make.

3. ATTACHMENT PROCEEDINGS—*Rights of Defendants.*—A party who resorts to attachment and thereby ties up the property of another must be ready at all times to maintain his writ whenever it is attacked. He must be ready for immediate trial.

Hecht v. Feldman.

Memorandum.—Attachment proceedings. Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 30, 1894.

The opinion states the case.

WILLOUGHBY & BINSWANGER, attorneys for appellants.

BLUM & BLUM, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

On the 16th day of October, 1893, the appellants, Max Hecht and S. G. Hecht, of the firm of Max Hecht & Brother, caused a writ of attachment against E. Feldman, the appellee herein, to be issued out of the clerk's office of the Superior Court of Cook County, returnable to the November term, A. D. 1893, of said Superior Court. This writ was in the usual form, commanding the sheriff to attach sufficient estate to satisfy the debt and costs, and to summon the defendant to appear and answer at the term of the Superior Court to be held on the 6th day of November next. Three days thereafter, and before the sheriff had returned the writ of attachment to court—said return not being made until November 15, 1893,—on the 19th day of October, 1893, the defendant in attachment filed a plea in abatement to the attachment writ, and made his application to Hon. James Goggin, then holding the October term of said court, to set down the attachment issue for immediate trial, and in support of his motion filed an affidavit in which he sets up that the property attached is his stock of goods consisting of World's Fair Guides, Souvenirs, etc., kept in his place of business near the World's Columbian Exposition; that said fair would close before the case in the ordinary course of legal proceedings could come to a trial, and that after the fair closed the goods would be of no value.

On the 21st day of October he filed another affidavit in which he says that he had made diligent efforts to obtain a bond for the purpose of being able to obtain possession of

the property levied upon, but had been unable to obtain such bond, and is unable to obtain it, but that if affiant could obtain the bond it would be of no value to him because it is necessary to dispose of the goods at once, and if kept until the final determination of this cause, by the time the suit came up, the goods would be practically useless.

On the 21st day of October, 1893, the plaintiffs, by their attorneys, entered an oral protest against the court "disposing of any motions, or making any orders, or taking any jurisdiction of this case at the present term," and also filed a written protest, in which, limiting their appearance for the purpose of protest, entered their protest against the court "taking jurisdiction of said cause, or hearing or disposing of the motions now pending on behalf of the defendants, or any other motion, or making any order in said cause at the present term of court."

The court having adjourned the hearing of said motion until the 25th day of October, 1893, the plaintiffs, on said last mentioned day, filed another protest against the trial of the attachment issue at the present term of court, and in support of said protest filed an affidavit of Sigmund G. Hecht, one of the plaintiffs, which sets forth that the plaintiffs are not able and can not be able to prepare for trial at the present term of court on account of the shortness of time which has intervened, and is to intervene between the time of the institution of said suit of attachment and the beginning of the November term, A. D. 1893, of said Superior Court; that defendant has by his plea denied every cause alleged in said affidavit for attachment, and will, as affiant believes, introduce witnesses to swear to same; that affiant has only himself and another witness by whom he can attempt to prove the allegations in said affidavit, but if the attachment issue is not tried at this term of court he can obtain witnesses, both in this city and elsewhere, to whom the defendant has admitted that he was about to leave the State, and have his effects removed from this State, as set out in the affidavit for attachment; and that he can find witnesses by whom he can prove the truth

Hecht v. Feldman.

of other causes of attachment set up in affidavit; that he is informed by his attorneys that it is unsafe for him to proceed with the trial at the present term of court; that he desires to secure witnesses to prove the causes for attachment set up in the affidavit, and has reason to believe that if not tried at the present term he can obtain such witnesses; that he has a just and meritorious cause of action, both as regards the attachment issue and the claim upon which said attachment was issued; that no declaration has been filed in his behalf, because, as he is informed, he has until the 27th day of this month before he is required to file the same.

The court, however, granted the motion for a new trial at that term upon the attachment issue; whereupon the plaintiffs by their counsel declined to take any part in the trial of the said attachment issue, and then and there excepted to the granting of said motion for a new trial of said attachment issue.

Said attachment issue having been tried by the jury, the plaintiffs not having taken part in said trial, the jury returned a verdict for defendant, to the acceptance of which verdict, and the entry thereof by the clerk, the plaintiffs excepted.

The clerk having entered said verdict of record, the plaintiffs entered their motion for a new trial, to be had at the November term, A.D. 1893, of said court.

The court overruled the motion for a new trial, to which the plaintiffs excepted, and the court having entered judgment on the verdict, the plaintiffs excepted and prayed an appeal.

So soon as the parties to a cause are brought or come into court it has personal jurisdiction over them, and may, with their consent, proceed at once to try the cause. The fact that a case is brought to the December term, that is, that the summons is made returnable at that term, does not deprive the court of jurisdiction to try the cause at the November term, if all parties come in and consent to such proceeding.

A defendant may, as soon as suit has been brought against

him, appear therein, and is entitled then to be heard upon such motions as he may make, among which are a motion to dismiss the suit, for security for costs, and for an immediate trial.

The statute concerning attachments provides that the plaintiff may have his writ returnable to the next term, or to any succeeding term to be held within three months.

In many cases if this right did not exist it would be necessary to continue the cause, because that a sufficient time for the publication necessary to be made as to parties not found had not elapsed.

Neither this section nor any other provision of the act is to be construed so as to operate as an instrument for oppression.

If a person may, by seizing one's goods and putting off the time of hearing for three months, coerce a defendant into submission to an unjust demand, the statute may easily be made the means of oppression.

The remedy by attachment is an extraordinary one. In advance of any determination that anything is due, a creditor may, upon affidavits as to the existence of certain things, seize the property of an alleged debtor and hold it for future determination as to there being any justification for such seizure. While the attachment act does provide for a release of the property seized, upon the giving of a bond by the alleged debtor, we do not think that for this reason the creditor should be permitted to delay a trial upon the right to maintain the attachment.

The alleged debtor may not be able to give a satisfactory bond, and yet the attachment be unwarranted and unjust. A party who resorts to this extraordinary remedy, and thereby ties up the property of another, should be ready at all times to maintain his rights to do what he has done; he ought not to be permitted, while holding the property of his debtor, to say, "when I am ready or when it is convenient for me, I will produce the evidence which justifies my act."

We see no reason why the rule existing in case of injunctions should not be applied here. The complainant who has

Legnard v. Crane Co.

procured an injunction must be ready to sustain his right thereto whenever it is attacked. Secs. 14 and 15, Ch. 69, R. S.; *Minturn v. Seymour*, 4 Johnson Ch. 173; *Jones v. Commercial Bank*, 5 How. (Miss.) 43; *Metropolitan Exchange v. Chicago Board of Trade*, 15 Fed. Rep. 847.

Likewise, the plaintiff in attachment should be ready for immediate trial; to tie up the defendant's property, deprive him of the means of earning a livelihood, and then ask him to wait until the plaintiff can get ready to sustain his action, is not just nor within the requirements of the attachment or practice act.

The statute permits the court for good and sufficient cause to try causes out of their order.

We think that the cause was in this case good and sufficient. The judgment of the Superior Court is affirmed.

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John B. Legnard v. Crane Company.

1. CORPORATIONS—*Admission of Corporate Existence*.—The appearance of a defendant in a name which, not being the name of a person or persons, must, to be the name of a legal entity, be the name of a corporation, is an admission that such defendant is a corporation.

2. CORPORATE EXISTENCE—*Denial by Plea, When Necessary*.—An appearance by a plaintiff as a corporation, is an assertion that it is a corporation, to be denied only by a special plea of *nul tiel* corporation.

Memorandum.—Assumpsit upon a promissory note. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 30, 1894.

The opinion states the case.

APPELLANT'S BRIEF, E. K. SMITH AND E. M. EHRLICH,
ATTORNEYS.

In order to sue, a corporation must be duly organized; it must show where it was organized, for a corporation is an inhabitant of the State that created it, or of the State where

it keeps its records and principal office, and exists only in contemplation of law and by force of law, and can have no legal existence beyond the State or sovereignty by which it is created. Connor v. Vicksburg & M. R. Co., 36 Fed. Rep. 273; Rice v. Newport News & M. V. R. Co., 3 W. Va. 164.

A corporation can have no legal existence out of the State creating it. The exercise of any power in another State depends on the will of that State. Gill v. Ky. Min. Co., 7 Bush. (Ky.) 635; Thompson v. Waters, 25 Mich. 214; N. O., J. & G. R. R. Co. v. Wallace, 50 Miss. 244; Bank of Augusta v. Earle, 13 Pet. (U. S.) 512; O. & M. R. Co. v. Wheeler, 1 Black (U. S.) 286; Liverpool Ins. Co. v. Moss, 10 Wall. (U. S.) 566.

It is essential that a corporation should set out and allege that it is a body duly and legally incorporated by and under the laws of the State, and a corporation may be required to state whether it is a foreign or domestic corporation. 2 Beach on Private Corporations, Sec. 863; Natl. Temp. Soc., etc., v. Anderson (1888), 2 N. Y. Supl. 49.

APPELLEE'S BRIEF, WILBER, ELDRIDGE & PINNEY, ATTORNEYS.

"The general rule is that one who deals with a corporation as existing *de facto*, is estopped to deny as against it that it has been legally organized." Bushnell v. Consolidated Ice Mach. Co., 138 Ill. 67.

The defendant executed the note sued on, to plaintiff, and having thus dealt with it, he is therefore estopped to deny it is legally organized. Exchange Nat. Bk. of Hastings v. Capps, 49 N. W. Rep. 223.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an action of assumpsit upon a promissory note, the declaration beginning, "The Crane Company, a corporation, plaintiff."

The appellant demurred — the demurrer was overruled — and the appellant abiding by the demurrer, the appellee presented the note, a witness testified to a computation of interest, and the court rendered judgment for the amount due.

Sinsheimer v. William Skinner Mfg. Co.

The only question presented that is not mere rubbish, is, whether the appellee should have set out in the declaration how it became, or is, a corporation.

In effect this was decided in the negative in *Bank of Washtenaw v. Montgomery*, 2 Scam. 422.

Appearance by a defendant in a name which, not being the name or names of a person or persons, must, to be the name of a legal entity, be the name of a corporation, is an admission that such defendant is a corporation. *Supreme Lodge v. Zuhlke*, 30 Ill. App. 98.

On the same principle such appearance by a plaintiff is an assertion that it is a corporation, only to be denied by a special plea of *nul tiel* corporation. *Morris v. Trustees of Schools*, 15 Ill. 266.

The quotation made from the declaration shows that it contains surplusage—the words “a corporation” being unnecessary. *Exchange Nat. Bank v. Capps*, 32 Neb. 242; *S. C.*, 49 N. W. Rep. 223.

The judgment is affirmed.

Simon Sinsheimer v. William Skinner Manufacturing Company.

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1. **AMENDMENTS OF PLEADINGS—Leave to Amend.**—Where a plaintiff amends his declaration the defendant is entitled to plead anew; but if, after leave, no such amendment is made, the refusal of the court to permit new pleas to be filed becomes immaterial. Leave to amend is not equivalent to an amendment.

2. **PRACTICE—Striking Pleas from the Files.**—Permission to strike out constitutes a striking out. Pleas stricken out are not actually removed from the files or erased; the leave itself makes them no longer a part of the pleadings in the case.

3. **NON-JOINDER—Of Parties.**—It is only by a plea in abatement that the non-joinder of a party can be taken advantage of by a defendant.

4. **DECLARATION—Defective—When Good After Verdict.**—In an action of assumpsit where it was alleged in the declaration that a purchase was made, from which a promise to pay is implied, a verdict will not be set aside because no promise to pay is specially alleged in the pleadings.

5. *VARIANCE—When Not Material.*—The fact that the proof shows the goods were sold to two, while the allegation is that they were sold to one, is not a material variance.

6. *PRACTICE—Joinder of Plaintiffs.*—It is an imperative rule that all living promisees whose interests are joint, be joined as plaintiffs. If it appear upon the record that there is another promisee who ought to have been joined as a plaintiff the judgment will be arrested. And if a promise is to two or more persons jointly, they must all, if living, join in the action or the plaintiff will be non-suited upon the trial.

7. *SAME—Action Against Partners.*—If an action be brought against one partner on a partnership account, the defendant may plead the partnership in abatement; he can not, upon the general issue, defeat the action by showing the partnership in evidence.

Memorandum.—Assumpsit. Appeal from the Circuit Court of Cook County: the Hon. ELBRIDGE HANECY, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed May 28, 1894.

The opinion states the case.

MOSES, PAM & KENNEDY, and JAMES R. WARD, attorneys for appellant.

JAMES A. PETERSON, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellee brought an action of assumpsit against appellant.

In the præcipe, summons and declaration, originally filed in this case, appellant, Simon Sinsheimer, is the only defendant designated. Appellee filed the common counts, originally, with an affidavit of claim thereto attached, to which appellant filed the general issue with an affidavit of merits. Subsequently, in 1891, appellee obtained leave to file four additional counts, in each of which it was specially averred and declared, substantially, that Simon Sinsheimer and Samuel Sinsheimer were copartners, doing business under the firm name of S. Sinsheimer, and as such copartners under such firm name, purchased from appellee goods and merchandise, and that the appellee delivered the same

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to the said firm of S. Sinsheimer; that upon the delivery of the same to said firm "the defendant, Simon Sinsheimer, in consideration thereof, promised" the appellee to pay for the same when so requested, and that, although often requested so to do, "the defendant, Simon Sinsheimer," had neglected and refused so to do.

To these counts the appellant filed a plea, verified, in which he denied that he had jointly promised and undertaken in manner and form as the appellee had in the special counts alleged; and by leave of the court the appellant also refiled the general issue verified, which he had previously filed to the original declaration.

Under the issue thus formed a trial by jury was had, which resulted in a verdict in favor of the appellee for \$278.35 damages on December 21, 1893.

At the conclusion of appellee's evidence the appellant moved to exclude the same from the jury, because the evidence was variant from, and did not support the allegations of the declaration, etc., this being a suit against Simon Sinsheimer alone, and upon an alleged individual promise of Simon Sinsheimer to pay the appellee the amount for which this suit was brought.

During the argument of the motion for a new trial, the court permitted the appellee, against appellant's objections, to amend the declaration by striking out all of the common counts originally filed, and also by striking out of all the special counts, wherever they appeared, the words "the said Simon Sinsheimer," and inserting in lieu thereof "the said firm of S. Sinsheimer." The appellant thereupon tendered a plea of non-assumpsit and a plea denying that he was a partner of and with the said Samuel Sinsheimer, doing business under the name and style of S. Sinsheimer; also denying that the partnership existed as in said declaration amended after verdict is alleged; which pleas were duly verified, but the court refused to allow appellant to plead to the declaration as amended after verdict, overruled the motion for a new trial, and rendered judgment upon the verdict in favor of the appellee January 27, 1894; the

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ent then and there excepted to each of said rulings
e judgment of the court, and appealed therefrom to
urt.

the plaintiff actually made the amendment to the
mal counts of his declaration he, after verdict, ob-
leave to make, the defendant would have been entitled
d anew to such amended counts, but as no such amend-
was made, the refusal by the court to permit new
o be filed becomes immaterial. Leave to amend is not
lent to an amendment. *Weiczorek v. Wisconsin Cen-
y. Co.*, 51 Ill. App. 498; *Ogden v. Town of Lake View*,
. 423.

o the permission given the plaintiff to strike out the
ur counts by him filed, the permission to strike out
utes a striking out. Pleas stricken out are not
y removed from the files or erased; the leave itself
them no longer a part of the plaintiff's allegations.
C. & St. L. Ry. Co. v. Rice, 47 Ill. App. 51.

gment was therefore rendered upon the additional
filed, which charge a purchase by the firm of S.
imer, consisting of appellant and Samuel Sinsheimer,
at in consideration of such purchase appellant promised
for the goods. The evidence of plaintiff has no
cy to show an individual or several promise to pay by
ent, while there was evidence tending to show deal-
r the plaintiff with the firm of S. Sinsheimer when
ent was a member thereof, and that without notice of
dissolution thereof, Samuel Sinsheimer bought from
intiff in the name of said firm the goods, to recover
urchase price of which this suit was brought.

ellant introduced evidence tending to show the disso-
of said firm and notice thereof to appellee before the
in question were purchased.

r by a plea in abatement could the non-joinder of
l Sinsheimer have been taken advantage of by appel-
McDonald v. Western Refrigerator Co., 35 Ill. App.
wigart v. Weare et al., 37 Ill. App. 258; *Murphy v.*
2 Wharton, 32.

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Appellant was properly permitted to introduce evidence tending to show that he was not jointly liable.

Appellant insists that the judgment rendered can not be sustained because the declaration charges a purchase by a firm, of which appellant was one, and a promise to pay by appellant only. The promise to pay should have been charged to have been by the firm.

We have been referred to no authority, holding that after verdict such a pleading is insufficient to sustain a judgment rendered thereon. The law does, indeed, from a purchase by a firm, imply a promise to pay by the firm, rather than a several promise by each partner to pay. The question here presented is one of pleading only, and may be said to be whether, in an action of assumpsit, it being alleged in the declaration that a purchase was made, from which is implied a promise to pay, will a verdict be set aside because no promise to pay is alleged in the pleading?

In *Avery v. Inhabitants of Tyingham*, 3 Mass. 160, the court held that all the facts necessary to ground a promise on being in the *narr.* the omission to allege a promise was not sufficient ground for arresting the judgment. To the same effect is the case of *Bell v. Hobbs*, 2 Geo. Decisions, 144.

We find no such error in allowing the introduction of evidence or as to instructions that we think the judgment should be reversed therefor.

The judgment of the Circuit Court is affirmed.

MR. JUSTICE GARY.

Suing the appellant alone, the common count for goods sold and delivered to him was the appropriate count, if it be true, as the jury have found, that the goods were sold to a firm of which appellant was a partner. The non-joinder of the other partner could only be pleaded in abatement. 1 Chit. Pl. 46; *McDonald v. Western Refrig. Co.*, 35 Ill. App. 283; *Swigart v. Weare*, 37 Ill. App. 258.

The proof that the goods were sold to two, while the allegation is that they were sold to one would seem to be a technical variance, but the authorities are against so hold-

ing. *Goelet v. McKinstry*, 1 John. Cas. (N. Y.) 405; 2 Chit. Pl. 217; *Murphy v. Cross*, 2 Wharton, 33.

There was never any need to add anything to the original declaration here, and all that has been added is but pleading the evidence which would support the original count for goods sold and delivered—a mode of pleading bad only on special demurrer. Whether a promise is express or implied, it is alleged in the same words. 1 Ch. Pl. 309.

MR. JUSTICE WATERMAN ON REHEARING.

In a petition for rehearing it is suggested that the true doctrine is, that “when it appears on the face of the declaration that any other person than the one who is sued, is liable, no plea in abatement is necessary,” and the case of *Swigart v. Weare*, 37 Ill. App. 258, is referred to as sustaining such petition. We do not think that *Swigart v. Weare* is authority for the doctrine for which appellant contends. It is an imperative rule that all living promisees, whose interests are joint, must be joined as plaintiffs. This is because if, upon a promise of five, three only bring suit, a judgment therein will be no bar to an action by the other two; but if five jointly promise, and action be brought against one only, judgment against that one is a bar to a recovery against any of the remaining contractors. *Chitty's Pleadings*, Vol. 1, 9; *Wann et al. v. McNulty*, 2 Gilman, 355; *Mitchell v. Brewster*, 28 Ill. 167; *Jansen v. Grimshaw*, 125 Ill. 468.

In the latter case the authorities are collected. See also *National Bank of Oshkosh v. Jennings Trust Co.*, 44 Ill. App. 285.

So if it appear upon the record that there was another covenantee who ought to have been joined as a plaintiff, the judgment will be arrested. And if a promise is to two or more persons jointly, they must all, if living, join in the action or the plaintiff will be non-suited upon the trial. *Wright v. Post*, 3 Conn. 142.

It is said in *Chitty*, Vol. 1, 42, that where there are several parties, if their contract be joint they must all be made defendants. By this is not meant that judgment will be arrested for such a non-joinder, but that a failure to join all

Joint promisors will afford ground for a plea in abatement. If an action be brought against one partner on a partnership account, the defendant may plead the partnership in abatement, and can not, upon the general issue, defeat the action by showing in evidence the partnership. *Rice v. Shute*, 5 Burr, 2611; *Abbott v. Smith*, 2 Black, 947; *Cabell v. Vaughn*, 1 Saunders, 291.

The question in the case at bar is not whether partnership promises are in this State joint and several, but admitting a partnership promise is joint only, if suit thereon be brought against but one, in what way can advantage be taken of the non-joinder? As to this, that the fact of the partnership can not be given in evidence as a defense, and that only by pleading in abatement can the non-joinder be set up to defeat the action, *Rice v. Shute*, *supra*, has for more than a century been almost universally followed. The dictum of Lord Mansfield in that case, that partnership obligations are joint and several, has been overruled, but the practice as to the necessity of pleading non-joinder in abatement, there established, remains to this day. Sixteenth Ed. from seventh Eng. Ed. of Chitty's Pleadings, Observations on *Pleas in Contract*, Abatement, page 269; Notes to *Boulton v. Sandford*, Vol. 1, p. 170, English Railway Cases; *Elder v. Thompson*, 13 Gray, 91; *Kendall v. Weaver*, 1 Allen, 277.

The writer of this opinion has grave doubts as to the merits of the controversy in this action, but can not say it is clear that the evidence did not warrant the verdict.

Petition for rehearing denied.

Eliza A. Page v. Northwestern Brewing Co.

1. **BILLS OF EXCEPTIONS**—*Exhibits in Evidence*.—To make exhibits offered in evidence a part of the record, they must be incorporated into the bill of exceptions with proper words of identification.

Memorandum.—Error to the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the

54	157
54	192
54	611
54	157
57	557

March term, 1894, and affirmed. Opinion filed April 19, 1894. Opinion on rehearing filed May 8, 1894.

The opinion states the case.

STIRLEN & KING, attorneys for the plaintiff in error.

LACKNER & BUTZ, attorneys for defendant in error.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This case is governed by Spangenberg v. Charles, 44 Ill. App. 526.

The bill of exceptions recites, "I offer this lease in evidence. The same was thereupon received in evidence, and marked Exhibit A." "I offer these receipts in evidence, being numbers 134 and 135, each dated March 25, 1893, each for the sum of \$50, and the same were therefore received in evidence and marked defendant's Exhibits A and B." Similar language is used as to other exhibits down to "I."

At the close of the evidence is inserted: "Which was all the evidence offered or received on said hearing." Then follow some propositions of law and the action upon them. Then without further words of identity, next preceding the finding by the court—there being no jury—are inserted several sheets, corresponding in description with the recitals in the bill. It is a plausible, indeed a reasonable, inference, that these sheets are the exhibits referred to by the bill; but there is no statement in the bill that they are in fact the same. Whatever against the interest of the plaintiff in error may be true, and not deny the statements of the bill, is to be presumed to be true. Matson v. Lally, 37 Ill. App. 484.

It is upon this doctrine that bills of exceptions, in cases where this court is asked to review findings or verdicts upon the evidence, must state that they contain all the evidence; or if the refusal of instructions is complained of, that the bills must state that they contain all that were given.

The judgment is affirmed.

MR. JUSTICE GARY ON PETITION FOR REHEARING.

Since the original opinion was filed the appellant applied

for leave to file an addition to the record from the Circuit Court, *nunc pro tunc*.

The “*tunc*” was denied, but if it had been granted the addition is a mere nullity, being an order, entered upon the record below, that certain amendments be made to the bill of exceptions.

A bill of exceptions can not be made by an order, however specific, entered by the clerk upon the record, and it logically follows that no addition to a bill can be thus made. *Wright v. Griffey*, 146 Ill. 394; S. C., 44 Ill. App. 115.

Without the exhibits the propositions of law are not shown to have any relevancy to the case, and in the abstract it does not appear that the refusal of them was excepted to. *Parry v. Arnold*, 33 Ill. App. 622.

“The appellant’s abstract shows no such objection or exception, and said abstract must, as against the appellant, be deemed to be sufficiently full and accurate to present all the errors upon which it now relies.” *Chi., Peo. & St. L. Co. v. Wolf*, 137 Ill. 360–4.

The appellant in the petition for rehearing, regards our concession of “a reasonable inference” as an acknowledgment that the bill is certain “to a certain intent in general” in the language of the books, and therefore that it stands the test “as a pleading of the party” laid down in *Rogers v. Hall*, 3 Scam. 5; but pleadings “must advance their positions of fact in an absolute form, and not leave them to be collected by inference and argument only.” *Stephen’s Pleadings*, 384.

An inference, not irresistible, is but conjecture more or less probable, and is no more reasonable here than in *Stock Quotation, etc., v. Board of Trade*, 144 Ill. App. 370, S. C., 44 Ill. App. 358, though the bill is nearer the mark here than there.

Glass v. Murphy, 4 Ind. App. 530, as to exhibits to code pleadings, is not much authority for the frame of bills of exceptions.

The petition must be denied.

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55	406

Charles E. Frankenthal et al. v. Levy Mayer et al.

1. **CHATTEL MORTGAGES—Rights of the Parties After Possession Taken.**—After default and possession taken by a mortgagee of personal property, the legal title is vested and he can maintain an action at law for a seizure or an injury done to such property. But the mortgagor retains an interest in the goods until divested thereof by sale under the provisions of the mortgage, or by lapse of time his right of redemption is lost.

2. **SAME—Rights of the Parties at Common Law.**—By the old common law, a mortgage of personal property gave an absolute title to the mortgagee on breach of condition. No process of foreclosure was necessary, and there was no right of redemption.

3. **MORTGAGES OF REAL PROPERTY.—Legal Estates Vested in Mortgagee.**—In respect to mortgages of real property at common law, the legal estate vested in the mortgagee and was forfeited upon default; equity established the right of redemption after default.

4. **SAME—At Law and in Equity—Injury to Reversion.**—A mortgage of land is one thing at law and another in equity; at law it is an estate, in equity it is but a security. Notwithstanding this, a mortgagor of lands may maintain an action at law for an injury to his reversion.

5. **MORTGAGES—Mere Securities.**—The law courts now recognize mortgages of all kinds as mere securities. The title may be differently regarded and treated in different forums, but until foreclosure the mortgagor has an interest in the property which is recognized at law as well as in equity.

6. **SAME—The Modern Doctrine.**—While courts frequently speak of the title of the mortgagee being absolute after default, it is not to be understood that the ownership is absolute. Nowhere is it now held that upon forfeiture the mortgagee may dispose of the property without reference to the interests of the mortgagor.

7. **REVERSION—Injury to the, etc.**—The action of case is a proper proceeding for an injury to property when the interest in it is in reversion. Such action is an appropriate remedy for a mortgagor when property has been injured while in the possession of the mortgagee.

8. **ACTIONS—Upon the Case—Requisites.**—Actions upon the case do not depend upon the holding by the plaintiff of a legal estate in the thing for an injury to which the action is brought. Where the fraudulent conduct of a party occasions injury to the private rights of another he is responsible in damages.

9. **CASE—Action of, When it Lies.**—When the mortgagee of personal property has, after default, taken possession of the goods for the purpose of foreclosure, the mortgagor can maintain an action of case against a third party, who without right and with violence takes such property from the possession of the mortgagee, against his will.

Frankenthal v. Mayer.

Memorandum.—Action on the case for goods wrongfully taken. Error to the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed April 19, 1894.

The opinion states the case.

TENNNEY, CHURCH & COFFEEN, attorneys for plaintiffs in error.

T. A. MORAN, attorney for defendants in error.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The question here presented is, when the mortgagee of personal property has, after default, taken possession of the goods for the purpose of foreclosure, can the mortgagor maintain an action of case against a third party, who without right and with violence takes such property from the possession of the mortgagee, against his will, the value of the goods being largely in excess of the amount of the mortgage? It is said that after default and possession taken by a mortgagee of personal property, the legal title to such property is vested in the mortgagee, and that he alone can maintain an action at law for a seizure of or an injury done to such goods. That the legal title of goods mortgaged, is, after breach of condition, vested in the mortgagee, is announced in numerous cases. Pike v. Calvin, 67 Ill. 227; Simmons v. Jenkins, 76 Ill. 479; Whittemore v. Tircher, 137 Ill. 243; Blain v. Foster, 33 Ill. App. 297.

Nevertheless, the mortgagor retains an interest in the goods until divested thereof by sale under the provisions of the mortgage, or by lapse of time his right of redemption has been lost. McConnell v. People, 84 Ill. 583; Jones on Chattel Mortgages, Secs. 682, 687 and 688; Waite v. Dennison, 51 Ill. 319-323; Whittemore v. Fisher, 132 Ill. 243 and 256.

By the old common law, a mortgage of personal property gave an absolute title to the mortgagee on breach of

condition. No process of foreclosure was necessary, and there was no right of redemption. Jones on Chattel Mortgages, Sec. 681; Taber v. Hamlin, 97 Mass. 489; Burtis v. Bradford, 122 Mass. 127.

In respect to mortgages of real property, also, the legal estate vested in the mortgagee and was forfeited upon default; equity established the right of redemption after default. Jones on Mortgages, Vol. 2, Sec. 11.

A mortgage of land is one thing at law and another in equity; at law it is an estate, in a court of chancery it is but a security.

Notwithstanding this, a mortgagor of lands may maintain an action at law for an injury to his reversion. Jones on Mortgages, Sec. 664.

The law courts, following the rule first set up in equity, have come to recognize mortgages of all kinds to be exactly what they are—mere securities. The title may be differently regarded and treated in different forums, but the actual fact that until foreclosure has in some way been had, the mortgagor has an interest in the property, is recognized at law as well as in equity.

While courts have and do frequently speak of the title of the mortgagee being, after forfeiture, that is after default, absolute, they do not mean that the ownership of the mortgagee is absolute. Nowhere is it now held that upon forfeiture, the mortgagee may sell the property, give it away, or destroy it without reference to or consideration for any right or interest of the mortgagor. Waite v. Dennison, *supra*; Phares v. Barbour, 49 Ill. 370; Hungate v. Reynolds, 72 Ill. 427; Cobbey on Chattel Mtgs., Sec. 937; Jones on Chattel Mtgs., Sec. 682; Dupuy v. Gibson, 36 Ill. 197; Story's Eq. Juris., Sec. 1031; Treat v. Gilmore, 49 Me. 34.

The action of case is a proper proceeding for an injury to property when the interest in it is in reversion. Chitty's Pleadings, title, Action on the Case.

Such action is an appropriate remedy for a mortgagor when property has been injured while in the possession of the mortgagee. Woodside v. Adams, 40 N. J. Law, 417, 422, 424, 426; Jackson ads. Turrell, 30 N. J. L. 329, 333;

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Jones on Chattel Mortgages, Sec. 683; Leach v. Kimball, 34 N. H. 568; Russell v. Butterfield, 21 Wend. 300; Schalk v. Kingsley, 42 N. J. Law, 32.

It is urged that after default the mortgagor has no legal estate whatever, and that the law knows no such thing as the remainder or reversion of a chattel.

Doubtless this was once the rule. It is unnecessary to discuss whether a right of reversion may or may not exist in a chattel, or whether any legal estate remains in the mortgagor after condition broken.

In this action we are not called upon to consider where the legal estate in the mortgaged goods is, but, a valuable pecuniary interest in them existing in the mortgagor, the question is, can he maintain an action upon the case against one who willfully destroys them?

Actions upon the case do not depend upon the holding by the plaintiff of a legal estate in the thing, for an injury to which the action is brought. Chitty's Pleadings, title, Actions on the Case; Yates v. Joyce, 11 Johnson, 136; Schalk v. Kingslêy, *supra*; Newman v. Tymeson, 13 Wis. 191.

As is stated in Yates v. Joyce, *supra*, "It is a sound principle that where the fraudulent conduct of a party occasions injury to the private rights of another, he shall be responsible in damages for the same."

We are therefore of the opinion that the demurrer to the declaration filed in this case should have been overruled.

The judgment of the Superior Court is reversed and the cause remanded.

**Margaret Moore and Jeremiah Kelly, Executors of the
Last Will and Testament of Bridget N. White,
Deceased, v. Ellen Gubbins et al.**

1. **WILLS**—Decree Setting Aside, Void for Want of Parties.—A decree setting aside a will in a suit where a legatee is not made a party is without effect as to him, and the failure to make him a party is reversible error.

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ate of the Testator's Mind.—On the trial of an
ity of a will, it is competent to show the pre-
e testator, and that the same continued past the
of the will. For that purpose the subsequent
or regarding the will itself are competent.

of the Testator.—The previous declarations of
s been admitted as affording evidence of his

of the Testator's Mind—Of Making the Will.—
weakness are naturally of slow growth, it is
ion of one's mind a few days after the doing of
vidence of what it was at the time the act was

o contest a will. Error to the Superior Court of
PHILIP STEIN, Judge, presiding. Heard in this
, 1894. Reversed and remanded. Opinion filed

s the case.

IN ERROR, F. E. MAKEEL, THOMAS E. D.
AND W. J. WATTS, ATTORNEYS.

ffered to prove declarations made by the
an four days after the execution of the
of showing the state of mind of the
out the time of the execution of the will.
ow that within a few days after the will
trix stated that she had made her will,
s made, and said she was satisfied and
er mind. Such declarations may not be
to prove the elements of the issue. They
or such purpose; they were offered to
ndition of the testatrix, and her knowl-
s of the will when it was made, and for
were admissible. *Massey v. Hunting-*
iler v. Brunstead, 99 Mass. 112, and cases
Whitney, 11 N. Y. 157, and cases cited;
rfer, 50 Md. 466; *Davis v. Rogers*, 1
Harleston v. Corbit, 12 Rich. (S. C.) 604.
idate a will on the ground of undue
st be evidence of a present operating re-
of making it. *Rutherford v. Morris*, 77

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Ill. 413; Eckhart v. Flowry, 43 Pa. St. 52; Wainwright's Appeal, 89 Id. 220.

Influences which do not appear to be connected with the testamentary act are not sufficient to impeach a will. Brownfield v. Brownfield, 43 Ill. 418; McMahon v. Ryan, 20 Pa. St. 329; Guild v. Hull, 127 Ill. 532.

Competency to make a will only requires that the testator should have capacity to comprehend and act rationally in the transaction in which he is engaged. Burt v. Quisenberry, 132 Ill. 395; Campbell v. Campbell, 130 Ill. 477.

One who is capable of transacting his own ordinary business, is capable of making a valid will. Brown v. Riggin, 94 Ill. 564; Carpenter v. Calvert, 83 Ill. 62; Freeman v. Easley, 117 Ill. 317.

The circumstances that the grantor or testator is of advanced age, very infirm physically, and somewhat enfeebled in mind, is not conclusive of his incapacity to dispose of his property; that if he has capacity to comprehend and act rationally in the transaction in which he is engaged, it is sufficient. Miller v. Craig, 36 Ill. 109; Myatt v. Walker et al., 44 Ill. 485; Lindsey et al. v. Lindsey, 50 Ill. 79; Baldwin v. Dunton, 40 Ill. 188; Stone v. Wilbern et al., 83 Ill. 105.

KING & GROSS, attorneys for defendants in error.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This is a case arising upon a bill brought to set aside the will of Bridget N. White, deceased.

One Thomas Kearns, a legatee under the will, was not made a party to the suit.

The decree rendered, setting aside the will, was therefore without effect as to him, and as to him the appellants remain executors.

The failure to make him a party is reversible error. All persons who may be injuriously affected by the decree sought should be made parties to a bill. Prentice v. Kim-

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kins v. Roseclare Lead Co., 72 Ill. 373; 4 Ill. 560; Freeman v. Earley, 117 Ill. 107, 122 Ill. 296.

While neither a party in the court below nor nevertheless here filed a disclaimer of the decree rendered by the Superior Court, thereby the error, existing because of the omission of him a party, has been removed.

But if we are to be reversed for other errors, we do not wish to pass upon this question, which it is to be decided upon another trial.

That the testatrix was not, at the time she executed the will, of sound mind and memory; also that she was unduly influenced thereto by fraudulent representations; and that her signature was procured by a false statement that the paper she signed contained certain provisions.

For the purpose of sustaining these charges have been introduced the complainants, the proponents of the will, and the statements concerning the same, made by them two to four days after it was executed. The defense, counsel for the defendants stated the evidence, as follows:

To show that Mrs. White knew what she was doing when she introduced evidence tending to show that she was of sound mind of the testatrix; we now wish to introduce evidence of mind continued past the time of the execution of the will, and for that purpose we offer to show declarations of the testatrix regarding the

that the evidence was admissible, and that the court should sustain it.

As the facts as are involved in this case are made, the testator accompanying the act are the facts affording, perhaps, the most satisfactory condition of his mind, as well as of the testator, and he led him to do what he has.

Declarations of the testator have always been introduced as evidence of his mental condition.

Place v. Dodge.

As mental strength and weakness are naturally of slow growth, it is manifest that the condition of one's mind a few days after the doing of an act presents strong evidence of what it was at the time of the act. *Shaller v. Bunistead et al.*, 99 Mass. 112, 120, 122; *Waterman et al. v. Whitney et al.*, 11 N. Y. 157; *Marsey v. Huntington*, 118 Ill. 80-88; *Boylan v. Meeker*, 28 N. J. L. 274; *Robinson v. Hutchinson*, 26 Vt. 47; *Rambler v. Tyron*, 7 Sergeant & Rawle, 90.

The objection made to the questions propounded to Mrs. Railton, asking her if she did not say to Margaret Callanan various things, should have been sustained. The questions were not cross-examination.

The decree of the Superior Court is reversed and the cause is remanded.

Doctor S. Place and John H. Whiteside v. Chester C. Dodge.

1. **INTEREST—As Damages—Rule of Computation.**—The legal rate of interest prevailing in this State is the limit of damages recoverable on account of holding money idle. The only loss the law contemplates under such circumstances is the loss of lawful interest.

Memorandum.—Action for deceit. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed April 30, 1894.

The opinion states the case.

KERR & BARR, attorneys for appellants; JOHN P. WILSON, of counsel.

ROBERT VAN SANDS, attorney for appellee; JOHN H. WHIPPLE, of counsel.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This is an action on the case for deceit by the appellants, in falsely representing to the appellee that they had au-

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ity to sell to him a certain lot of land in Chicago, for owner thereof, residing in Cincinnati.

we do not consider it necessary to review the evidence. There was sufficient evidence tending to establish the fact of such an assumption and representation of authority by appellants, without strict warrant therefor, and such a fact by appellee in appellants' representations of authority without knowledge by him of their limited authority as to preclude a court of review from disturbing the actual findings of the jury that appellee did not know who owner was, or the terms upon which he had authorized appellants to sell the lot, and that appellants did make false and willful representations to the appellee touching authority in the matter.

The amount of damages recovered is the only question we are justified in reviewing.

It appears that immediately after appellee signed the contract to purchase the lot, he converted into money a sufficient amount of interest-bearing securities, held by him, to place himself in funds to pay for the lot as soon as the same should be examined and the deed be ready for delivery. The securities bore ten per cent interest, and it is plain from the items of damage testified to by appellee, that \$1.09 as interest on the purchase price of the lot, at the rate of ten per cent per annum, for the time it was kept on hand, was allowed by the jury in making up the total of the verdict, and entered into the judgment.

This was erroneous. The legal rate of interest prevailing in this State was the limit of damages recoverable on account of holding the money idle.

The only loss the law contemplates under such circumstances is the loss of lawful interest. Sedgwick on Damages, Secs. 174, 179.

It would make no difference whether government bonds, paying only three per cent interest, or bank stocks, paying twenty per cent dividends, were converted; the loss that the court would take into account, would, in either event, be the loss of interest at the statutory rate for the time the money

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was held, no more and no less. And the rule would be the same although no securities were converted, but money already on hand were held for the purpose.

Counsel for appellee makes an ingenious suggestion as to how the jury might have made up the \$460.09, which was testified to by his client as the interest he lost by keeping the purchase price on hand, but we may not guess what the jury might have done, when we have in the record an exact statement of his client, which includes that particular item, and foots up the precise amount of the verdict.

It is also, in the same way, plain that the verdict and judgment include \$149 for master's and attorney's fees in the chancery suit of Strobridge, the owner of the lot, against the appellee, to set aside, as a cloud upon the owner's title, the contract which appellants had made with appellee for the sale of the lot, and which the appellee had filed for record after he knew that Strobridge had repudiated the contract and refused to carry out its terms. To that bill in chancery the appellee filed a cross-bill for specific performance.

Most, if not all, of such expenses, paid by appellee, were of his own incurring, in a litigious attempt by him to enforce an unauthorized contract, by recording the contract after he was informed that the owner repudiated it, and compelling a suit in chancery to remove a cloud he himself had created upon the owner's title, and by filing in that suit a cross-bill to enforce performance of the contract.

Except that counsel for appellants expressly admitted, on the trial below, that he made no objection to the master's fees, and in his brief here tacitly admits the correctness of the attorney's fees paid by appellee in that litigation, we should be disposed to criticise the including of such expenses in the judgment.

The attorney's fees paid by the appellee for examining the abstract of title were properly included in the verdict and judgment, and so would, also, be lawful interest on the purchase money, held by the appellee, from the date he converted his securities into money, February 1, 1888, to the

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in February, 1889, when the bill was filed by the owner, remove the contract from the record as a cloud upon his . After that date, appellee was not justified in holding money to perform a contract repudiated in so solemn a manner as by that suit. His right of action against the plaintiffs then became fully ripened, and he could not by longer holding of the funds increase his damages against them.

For the errors indicated, the judgment will be reversed and the cause remanded, unless the appellee shall, in this term, within ten days, enter a remittitur from said judgment, as of the date thereof, of all excess of the judgment over the sum of \$174, increased by the addition of interest \$2,625, at six per cent per annum, from February 1, 1888, to the date of filing said bill in chancery.

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DELIVERY—What is Sufficient.—An order upon the bailee, in whose custody the property in question is, to deliver it to a person named in the order, the order being delivered to the agent of such person, is a good delivery.

SPECIAL AGENTS—Acts in Excess of Authority.—Where an agent received an order to buy a load of cattle for his principal, and bought two loads, one of which he shipped to his principal, and the other he misappropriated, it was held, that by the purchase of one load his authority was exhausted, and if it appeared that the load shipped to his principal was purchased before buying the second load, then the principal acquired no property in the cattle purchased after the agent's authority was exhausted.

PRINCIPAL AND AGENT—Of Two Innocent Persons Which Should Suffer.—Where property is purchased by an agent with a fraudulent intent to apply it to his use, and does so, contrary to the authority received from his principal, as between him and his principal the latter will neither be bound nor acquire any property by it, while the seller may be treated as an innocent party, to hold the principal for the price, upon the ground that both being equally innocent, the principal having put it in the power of the agent to defraud, is the one who must suffer.

FORGED ORDERS—Delivery of Property—Custom.—Where prop-

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erty is delivered upon a forged order, the person making the delivery is not protected by it, and is liable for the value of the property. Custom can not make valid a delivery upon a forged order.

5. **RESCISSION**—*Of Contracts May Be Inferred.—Effect of.*—Contracts may not only be rescinded by mutual consent, but a rescission may be inferred from the conduct of parties. By rescission each party is remitted to his original right.

6. **TROVER**—*What Necessary to Maintain.*—To maintain the action of trover the plaintiff must have, at the time of the conversion, a complete property, either general or special, in the property, and actual possession of a right to immediate possession.

MR. JUSTICE GARY dissenting.

Memorandum.—Assumpsit. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed July 2, 1894.

STATEMENT OF THE CASE.

Samuel Fleischman, for a year or two prior to March 14, 1890, was a cattle buyer at the Union Stock Yards, in Chicago. He did an extensive business, chiefly in acting as buyer or agent for butchers and cattle dealers who resided outside the city of Chicago. One of the persons for whom he so acted was a Walter Bussell, of Detroit. The business was conducted about as follows: Bussell would notify Fleischman, by letter or wire, when he desired cattle. Fleischman would go into the yards, pick out such cattle as, in his opinion, suited the requirements of his principal, negotiate with the commission man to whom the cattle desired by Fleischman had been consigned, and, if the price of the cattle was satisfactorily arranged, buy them; thereupon the commission man and Fleischman would go to the weigh-master of the stock yard company, by whom was made out a scale ticket, giving the number and weight of the cattle, from whom purchased, to whom weighed, and containing other memoranda respecting the sale, which was delivered to the seller. The scale ticket was then taken by the seller to his office, and the price of the cattle sold being paid by the buyer or agent, or a credit given for the price thereof, the seller gave to the buyer an order upon the stock yard com-

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or the cattle so sold. Upon presentation of this stock yards company, or its employes in charge of cattle, the cattle mentioned in the order over to the buyer or agent for shipment or ion, as will be mentioned later.

had acted as the agent of Bussell in the purchase in the way described, for a period of some time, and less than two years; say fifteen months prior to May 14, 1890. During this time used cattle for other non-resident butchers and, notably H. Phillips and L. Fleischman.

On May 14, 1890, Bussell, at Detroit, telegraphed to the plaintiff company, at Chicago, to buy him (Bussell) "a load of cattle, if they are my kind and come right." On the morning of May 14, 1890, Fleischman told Mr. Zimmerman, the plaintiff company, that he had an order for cattle, and between nine and ten o'clock that day he delivered to the plaintiff, acting through Mr. Zimmerman, the cattle mentioned in the order, and delivered to Fleischman, as follows:

"CHICAGO, May 14, 1890.

Stock Yard & Transit Co.:

deliver to	Bussell	
cattle	Hogs	Sheep
Pen	Division D,	Scale 5.

MALLOBY, SON & ZIMMERMAN Co.,
Per WM. BUHLMAN."

On the day of the delivery of the cattle, the plaintiff company took the order and later in the day sold the cattle mentioned therein to Holmes & Pattison, a commissioning business at the stock yards, and going to the place in connection with the block and pen where the cattle were delivered, with a representative of the firm of Holmes & Pattison, who endorsed the order as follows: "To Holmes & Pattison. S. Fleischman."

On the day of the delivery of the cattle mentioned in the order to Holmes & Pattison by the stock yards company.

On that day the officers of the plaintiff company made a statement to the effect that Fleischman had run

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away, and thereupon Mr. Zimmerman and Mr. Mallory went to the Transit House, where Fleischman lived, for the purpose of learning “whether he was going to pay for the cattle,” but did not succeed in finding him there, nor indeed, so far as appears, did they ever find him. Not finding Fleischman at the Transit House, the plaintiff company made out and forwarded the following bill and letter to Mr. Bussell, at Detroit:

“U. S. YARDS, ILL., 5/14, 1890.

OFFICE OF MALLORY, SON & ZIMMERMAN Co.

Sold Wm. Bussell.

DATE.	CATTLE.	HOGS.	SHEEP.	WEIGHT.	OFF PRICE.	AMOUNT.
5/14	6			6,150	3.10	\$190.65
	3			3,170	3¼	103.02
	2			2,250	4c.	90.00
	9			7,580	3.65	276.67
	3			1,500	3c.	45.00
	3			3,200	3.40	108.80
	1			960	3.40	32.64
	27					\$846.78

Dear sir: We sold the above cattle to S. Fleischman, for your account on the date as above, but have not received payment for same. Please remit at once, and oblige,

Yours respectfully,

MALLORY, SON & ZIMMERMAN Co.,

Per Bryant.”

Mr. Bussell replied that he had neither ordered nor received from Mr. Fleischman the bill of cattle covered by the communication of May 14th, and he should, therefore, decline to pay the account.

The next step taken by the plaintiff company was to forward to the stock yard company the following communication:

“UNION STOCK YARD & TRANSIT COMPANY,

To MALLORY, SON & ZIMMERMAN Co., Dr.

To 27 cattle, as per bill attached.....\$846.78.

These cattle were sold to S. Fleischman, May 14th, for

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count of Wm. Bussell, Detroit, and we gave the order to Wm. Bussell, direct. Your employes delivered the cattle to her parties; and as Mr. Bussell did not get the cattle, he fuses to pay for them; and as you delivered the cattle to hers than Wm. Bussell, we look to you for the amount. Please adjust same at once, and oblige.

MALLORY, SON & ZIMMERMAN Co.,

Per C. A. MALLORY, Treas."

The following reply was thereupon made by the defendant company, appellant in this court:

"THE UNION STOCK YARDS COMPANY, OF CHICAGO,

JAS. H. ASHBY, General Superintendent.

UNION STOCK YARDS, CHICAGO, May 24th, 1890.

MALLORY, SON & ZIMMERMAN Co., Union Stock Yards,
City.

Gentlemen: Referring to your claim of \$846.78, under date of the 23d instant, account of alleged wrong delivery of cattle by the employes of this company, would say, that find, upon examination of your order, that these cattle are properly delivered on it, as directed, and consequently we can assume no responsibility in the matter.

, Very respectfully,

JAMES H. ASHBY,

General Superintendent."

Subsequently, and on June 18, 1890, formal demand for the possession of the twenty-seven cattle was made by the plaintiff company upon the defendant company, and at a later period an action of trover for the conversion of the twenty-seven cattle was commenced by the appellee against the appellant, and proceeded to judgment for \$1,004.25, being the sum for which the twenty-seven cattle were sold, and interest thereon from the date of sale to the date of trial, and from that judgment the stock yard company has appealed.

APPELLANT'S BRIEF, WINSTON & MEAGHER, ATTORNEYS.

It may be stated, as a general rule, that whenever a person has held out another as his agent authorized to

act for him in a given capacity; or has knowingly and without dissent permitted such other to act as his agent in such capacity; or where his habits and course of dealing have been such as to reasonably warrant the presumption that such other was his agent, authorized to act in that capacity; whether it be in a single transaction or in a series of transactions, his authority to such other to act for him in that capacity will be conclusively presumed, so far as it may be necessary to protect the rights of third persons who have relied thereon in good faith and in the exercise of reasonable prudence, and he will not be permitted to deny that such other was his agent, authorized to do the act that he assumed to do, provided that such act is within the real or apparent scope of the presumed authority. Mechem on Agency, Sec. 84, p. 60.

APPELLEE'S BRIEF, PECK, MILLER & STARR, ATTORNEYS.

A custom, in order to be binding, must be proved to exist, and must be proved to be (1) immemorial, (2) continued, (3) peaceable, (4) reasonable, (5) certain, (6) compulsory, (7) consistent, and must, when allowed, receive a strict construction. Bl. Com., pp. 76, 79.

A custom to avail as such must be ancient, certain, uniform, reasonable, and so general as to afford a presumption that the parties contracted with reference to it. *Dixon v. Dunham*, 14 Ill. 324; *Kinney's Digest*, 694.

Where a sale is avoided by a vendor for fraud on the part of the person with whom he dealt, it is as to the buyer as if no sale had ever been made; as if the original taking and parting with possession had been tortious. *Doane v. Lockwood*, 115 Ill. 490, and cases there cited; 2 *Morse on Banks*, 3d Ed., Sec. 474a; *Van Bibber v. Bank of Louisiana*, 14 La. Ann. 481; *Dodge v. National Exchange Bank*, 19 Ohio St. 526.

When a party is intrusted with the goods of another, and transfers them to another without orders, it is a conversion. *Syeds v. Hay*, 4 Fed. Rep. 260.

If a carrier, by mistake, delivers goods to the wrong person, he is liable in trover. *Stevenson v. Hart*, 4 Bing. 476.

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So with a wharfinger or other bailee. *Deveraux v. Barclay*, 2 B. & Ald. 702; *Price v. Oswego R. Co.*, 50 N. Y. 213; *Adams v. Blankinstein*, 2 Cal. 413; *Winslow v. R. Co.*, 42 Vt. 700.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It is urged that there was not only a sale of the cattle to Bussell, but a delivery also, and that consequently the property in the cattle passed to Bussell, and plaintiffs can not maintain this suit.

The delivery was by an order upon the appellant, the bailee in whose custody the cattle were, to deliver them to Bussell; this order was handed to Fleischman, who was Bussell's agent to buy and ship.

This we think would be a good delivery. *Taxworth v. Moore*, 9 Pick. 347; *Carter v. Willard*, 19 Pick. 1; *Burton v. Curyea*, 40 Ill. 320; *Weber v. Granger*, 78 Ill. 230.

It appears that Fleischman, upon receiving the telegram from Bussell, bought in Bussell's name two loads of cattle; one of these, consisting of twenty-three head, he shipped to Bussell and drew a draft upon him for their cost, which draft Bussell paid. By the purchase of one load, Fleischman's authority to buy was exhausted, and if it appeared that the load shipped to Bussell was purchased before the buying of the load from appellee, it would be clear that Bussell acquired no property in the cattle purchased from appellee.

In the absence of evidence as to which load of cattle was first purchased, and consequently, which load Fleischman had authority to buy, recourse must be had to an examination of the conduct of Fleischman, for the purpose of determining which load it was that he *bona fide* intended in the discharge of his commission to buy for the use and benefit of Bussell.

In buying one or the other of these loads, Fleischman did not intend to buy for Bussell; was not acting for him but for himself, intending to use the cattle for his own fraudulent purposes.

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If the cattle purchased from appellee were purchased with a fraudulent intent by Fleischman to apply them to his use, such purpose, not being the carrying out of any order received from Bussell, would, as between Fleischman and Bussell, be a thing by which Bussell would neither be bound nor acquire any property, while appellee might be able, as an innocent party, to hold Bussell to a bargain so made. Appellee, if allowed to recover the purchase price from Bussell, would do so upon the ground that it and Bussell being equally innocent, he having put it in the power of Fleischman to defraud is the one who must suffer, rather than they.

Appellee has not, so far as appears since all the facts became known to it, sought to hold Bussell, but by bringing the present action has acquiesced in his representation of Fleischman's purchase.

Appellant has not acted upon anything that Bussell did; it is immaterial to it whether it respond to Bussell or appellee for the value of these cattle which it delivered upon a forged order; and its insistence that the property in these cattle passed to Bussell, despite the fraud of Fleischman and the repudiation of his acts by both Bussell and Fleischman, is an urgency of an alleged technical transfer between other parties, without its having, as an innocent party, delivered the cattle upon the order of the party whose property it alleges the cattle were.

If the order had not been forged, if appellant had from Bussell authority to deliver, its position would be very different.

The question in this case is not, however, in whom was the ownership and right of possession of these cattle when appellant delivered them to Holmes & Pattison, but in whom was the ownership and right of possession at the time this action was brought. Granting that the sale and delivery by appellee was such as to then vest the property in Bussell, appellee and Bussell could rescind such sale and revest appellee with the ownership of the cattle.

This they did.

Bussell, upon being informed of the purchase by Fleisch-

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ian, repudiated it as made without authority; and appellee acquiesced in such repudiation by bringing this suit, which is in disaffirmance of any ownership by Bussell.

Appellant delivered the cattle upon a forged order. There was no authority from appellee or Bussell to deliver the cattle to Homes & Pattison. Appellants are therefore liable to appellee or Bussell for the value of the cattle. No custom can make valid a delivery upon a forged order. Bussell, distinctly, before the beginning of this suit, repudiated the sale claimed to have been made to him, and appellee accepted and acquiesced in the position.

The contract and sale between appellee and Bussell, if any there was, they by mutual consent abandoned.

Contracts may not only be rescinded by mutual consent, but a rescission may be inferred from the conduct of parties. *Line v. Rogers*, 15 Mo. 315; *Wehrli v. Renholdt*, 107 Ill. 5; *Fletcher v. Cole*, 23 Vt. 114; *Tomlinson et al. v. Roberts*, 5 Conn. 477; *Alden v. Thurber*, 149 Mass. 271; *Parmly v. Duckley*, 103 Ill. 115.

While it is true that to maintain the action of trover the plaintiff must have had at the time of conversion a complete property, either general or special, in the property, and actual possession or a right to immediate possession, yet the general rule is that by the rescission of a contract each party is remitted to his original right. *Briggs v. Murther*, 2 Phila. 179; *King v. Price*, 2 Chitty, 18 Conn. Law, 416; 3 Am. Ency. of Law, 92.

The plaintiff, by virtue of the rescission and abandonment by mutual consent of the contract of sale, if any there was, was remitted to this ownership and right of possession as of the time of the conversion, the rights of no third persons having intervened; the ownership and right of possession of the cattle was thus at the beginning of this action in appellee, and to them appellant must respond.

The judgment of the Circuit Court is affirmed.

MR. JUSTICE GARY, dissenting.

The appellees show that they sold the cattle to Bussell, through Fleischman.

The telegram by Bussell to Fleischman to buy a load of cattle, being accompanied by no funds, was an authority to buy in accordance with the usual course of business, drawing for the price and commission on Bussell, with bill of lading attached. *Hunter v. Gordon*, 33 Ill. App. 464.

The delivery order given by the appellee to Fleischman upon the appellant, was a symbolical delivery of the property, having the same effect as an actual delivery of the cattle. *Burton v. Curyea*, 40 Ill. 320; *Webster v. Granger*, 78 Ill. 230.

Conceding that the appellant made a wrong delivery and is therefore liable in trover to the owner of the cattle, yet it is not liable to anybody not owner. The appellee must, therefore, to claim as owner, get rid of the sale to Bussell.

That Fleischman was not a general, but special, agent, may be admitted, and also that, as consequence, a purchase by him in excess of his authority, would not bind Bussell, and therefore would not vest the property in him. Not vesting in him it would remain in the appellee. But how is it to be shown that the purchase was in excess of Fleischman's authority? There was his authority, and in appearance he was executing it. But if he has already bought one load of cattle that authority was exhausted, and being but a special agent, whoever dealt with him took the risk. *Schilling v. Rosenheim*, 30 Ill. App. 81.

But the fact, if it be the fact, that he had already bought one load of cattle, is an affirmative fact to be proved by whomsoever claims any benefit of the fact.

What Fleischman said or did, except in executing his agency, is not evidence for or against either party, and *a fortiori* any inference from his conduct is not to affect either of them.

As the appellee shows nothing to indicate that at the time it sold to Bussell through Fleischman, the authority of the latter had been exhausted, the sale to Bussell is not avoided.

If, then, Bussell was the owner of the cattle at the time of the wrong delivery, no subsequent acts of Bussell or of

the appellee could transfer the right of action which Bus-sell had, to the appellee. Rescission, or the act to rescind, has nothing to do with the case. The cattle are gone and nobody is following them.

H. B. Tibbetts v. West and South Town Street Railway Company.

1. **STREETS OF A CITY—Controlled by Municipal Authority.**—The streets of a city are controlled by the municipal authorities for the benefit of the public. The municipality may, subject to certain restrictions imposed by the statute, prescribe the manner in which the streets shall be used by the public, and may close or vacate them.

2. **SAME—Rights of Abutting Owners.**—An owner has no right to the perpetual maintenance of a street upon which his property abuts, although he may be entitled to recover damages because of the vacation of the street by the municipal authorities.

3. **SAME—Right of Abutting Owner to an Injunction.**—While an abutting owner is by the statute made one of a favored class, upon whose petition alone the council can permit the laying of railroad tracks in a street, it does not follow that to such owner is given a right to insist that the courts shall interfere and protect the rights of the public in respect to the streets.

4. **SAME—Nature of Abutting Owner's Right.**—The abutting owner's right to use the street is no greater than that of the rest of the public, and unless he sustains from the use to which the street is put by the municipal authorities, a damage special and peculiar to himself, he can not maintain a suit to compel the abandonment of such use. He can not assume to represent the public, and by his individual suit conclude its rights.

5. **SAME—Abutting Owner's Remedy at Law.**—For damage special and peculiar to himself, an abutting property owner has, under the constitution and laws of this State, a remedy at law. The fact that by permission to use the street for a particular public purpose, an abutting owner will be specially damaged, affords no ground for restraining such use, so long as such owner is able to recover and collect the damage he suffers.

Memorandum.—Bill for injunction. Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed May 28, 1894.

STATEMENT OF THE CASE.

On September 8, A. D. 1893, H. B. Tibbetts, the appellant, filed his bill of complaint in the Circuit Court of Cook County, Illinois, and alleged therein as follows :

That he is the owner of 100 feet frontage on Lawndale avenue, between 22d street and the Chicago, Burlington & Quincy Railroad. That appellant is also the owner of lots one and two of block four, of Millard & Decker's subdivision, and having a frontage of 125 feet on West 25th street at the corner of Millard avenue.

That the property above described as being on Lawndale avenue is improved by two frame stores, and the rear of said premises is occupied by appellant as a coal yard, the street approach to which is from Lawndale avenue; that the property above described as fronting on 25th street is improved by a two-story frame residence.

That the west and south town street railway company is acting as, and claims to be a corporation, duly authorized under the laws of Illinois, and particularly under an act concerning corporations and the certain amendatory acts thereof, now forming chapter thirty-two, and an act in regard to horse and dummy railways, now forming chapter sixty-six of Revised Statutes of Illinois.

That on February 8, 1892, the city council of Chicago, upon petition of said company, in pursuance of notice published, and upon a pretended petition of the owners of land fronting upon said Lawndale avenue, passed a purported ordinance, "Exhibit A," that in section one of said pretended ordinance, it is provided that authority is granted to construct a single or double track railway upon certain streets of Chicago, including the pretended authority to construct the railway therein described on Lawndale avenue from 22d street past the premises of appellant to 35th street, and being a total distance of a mile and a half.

That said city council passed said ordinance giving such permission to said company, without the lawful petitions therefor of the owners of land representing more than one-half of the frontage of each mile and of the fraction of a

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in excess of the whole miles, measured from the initial point named in such petition, of the part of said Lawndale street sought to be used for railroad purposes, as required by paragraph ninety of section one, article five, chapter twenty-four, of an act approved April 10, 1872, as amended, of the Statutes of Illinois, and that, at the time aforesaid, the city council did not have before it, or at any time when the said ordinance was passed, the lawful petition of the owners of the land, representing more than, or as much as, half of the frontage of each mile of said street or part thereof, as is sought to be used for the purpose of said rail-

road at a petition, purporting to be such a petition of owners of land representing more than one-half of the frontage of said street aforesaid was presented; that the signature of Thomas A. Burleston, thereto, one of said land owners, appears to be signed as A. T. Burleston, but without the authority therefor appearing on said petition or therewith; that the same is therefore invalid; that the signature of C. L. Ingram & Bro., by J. L. B., agent, appears on said petition, and that said C. L. Ingram & Bro. is, or purports to be, a corporation, but that no authority for such signature is shown on said petition or therewith; that the same is invalid; that the signature of Augustus Jacobson and Joseph E. Gary appears to be signed as Augustus Jacobson merely, and that no authority is shown on said petition or therewith, authorizing said Jacobson to sign for said Gary; that said petition as to signatures of C. L. Ingram & Bro. and Kiley are invalid, and within the contemplation of the statute.

That the aggregate frontage pretended to be signed as required by said statute, is not in contemplation of said statute 992 feet; and if said frontage and the signatures therefor are deducted from the total amount signed to said pretended petition, said owners would not be the owners of the land representing more than, or as much as, one-half of the frontage of each mile and of the fraction of a mile in excess of the whole mile, measuring from the initial point named in such petition, of such street, or of the part thereof sought to be used for railway purposes.

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That on April 5, 1893, the city council, upon petition of said company, in pursuance of notice and upon the pretended petition of property owners, but without authority or warrant of law, passed another purported ordinance, "Exhibit B;" that section one thereof provides for the construction of a railway upon certain streets of Chicago, and to construct the railway therein described along West 25th street from Lawndale avenue to Rockwell street, a distance of a mile and a half; that said pretended petition purports to be signed by Mrs. N. F. McCormick, by Cyrus H. McCormick, attorney, for 600 feet of frontage, but without the authority therefor appearing on or with said petition; that the same is therefore invalid within the contemplation of the statute; and deducting said 600 feet from the total frontage pretended to be signed to said petition, said ordinance was not passed upon the petition of the owners of the land, representing more than one-half of each mile and of the fraction of a mile, in excess of the whole miles, measured from the initial point named in such petition, of the part of said street sought to be used for railway purposes.

That defendant, without any authority than as aforesaid, has already constructed exceeding six miles of the system of railways described, and is now operating the same with a line of horse cars, and has constructed its tracks in front of appellant's premises, fronting on 25th street; and that appellee has contracted, or is about to contract for equipment to change its motive power from horse-cars to electricity, including the erection of trolley poles and wires in front of appellant's lots, above described; and, unless restrained, will continue and construct and operate the same over the entire territory covered by said pretended ordinances, and will thereby inflict upon appellant great and irreparable injury.

That each of the said parcels of real estate of appellant will be specially, greatly and irreparably damaged by the construction and operation of said railway in front thereof and on and along the streets, respectively, on which the same abut; that said real estate will be thereby greatly

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eciated in value, and its access to, and use of said streets, off or greatly damaged.

ppellant prays that appellee, its agent, officers, superintendents and employes, and any and all contractors or persons acting under its authority, may be restrained from ever proceeding to construct, and from maintaining and operating a line of single or double track street railway, over and along said Lawndale avenue, between said street and said 35th street, and on, over or along said street 25th street, between Lawndale avenue and Rockwell street, and from completing or laying in said streets, or part thereof, any single or double track, switch, turn-out, trolley wires, poles or appurtenances for an electric street railway.

On September 29, 1893, appellee filed a general and special demurrer to appellant's bill of complaint, and for special cause of demurrer, showed:

That injunction is not a proper and lawful remedy; that the remedy for such supposed wrongs and grievances is by the proper action at the common law.

That if all the matters and things alleged were true, appellant might have adequate remedy at the common law.

That the pretended right to file the bill herein, according to the frame of said bill, rests largely upon supposed special damages. Whereas, if the claim made by appellant was true, the remedy would be, not by bill in equity, but either at the common law or under the statute eminent domain.

That the bill asserts the usurpation and unlawful exercise of a franchise, and that the remedy therefor should be an information in the nature of a *quo warranto*, and not a bill in equity.

That the matter on which judgment is sought is of a legal nature and is vested in the jurisdiction of the legal authorities of Chicago, and this court has no jurisdiction to set aside the action of said authorities until said action is impeached in an action at law.

That appellant has no interest in said railway's construction or non-construction, except as the same relates to

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premises which he claims to own; that his right to object to the construction of said railway is limited by law to the particular mile of said railway in which said premises are located.

7. That appellant has waived his pretended cause of action.

8. That appellant is estopped from asserting his pretended cause of action to enjoin.

9. That appellant has been guilty of such *laches* in bringing said bill as to deprive him of the aid of equity.

10. That said bill is otherwise insufficient and uncertain.

The Circuit Court sustained the demurrer and dismissed appellant's bill for want of equity. To reverse that judgment, appellant brings the record to this court, and urges a reversal on the ground that the court erred in sustaining the demurrer and in dismissing the bill.

ROY O. WEST, attorney for appellant.

APPELLEE'S BRIEF, PECK, MILLER & STARR, ATTORNEYS.

The private citizen or property owner has no standing to enforce public right, or redress public wrongs or nuisances, as such, except in case he suffers special damages or injury; and then his cause of action is based thereon. He must aver and prove such special damage; and this is the gist of his right of action. The public authorities can alone enforce mere public rights, or redress mere public wrongs or injuries. *Sparhawk v. Union P. R. Co.*, 54 Pa. St. 401; *Patterson v. C., D. & V. R. R.*, 75 Ill. 588; 1 *Spelling, Extra Relief*, Sec. 382.

If the property owner does sustain such damage to his property right, by reason of a violation of public right or of a public nuisance or wrong, as to give any right of action at all, then it is thoroughly well settled, in this State, that he can recover his damages at law. *Rigney v. Chicago*, 102 Ill. 64; *C. & E. I. R. R. v. Ayres*, 106 Ill. 511; *C. & E. I. R. R. v. Loeb*, 118 Ill. 203; *Stetson v. C. & E. I. R. R.*, 75 Ill. 74; *Patterson v. C., D. & V. R. R.*, 75 Ill. 588; *Peoria, etc., v. Schertz*, 84 Ill. 135; *Penn. M. L. I. Co. v. Heiss*, 141 Ill. 35

His rights so far as the street is concerned, are the appurtenant rights of access, light, air, etc. It can be nothing other than such appurtenant rights in respect of which appellant can, by any possibility, sustain damage by this railroad. Could he find in his action at law an ample remedy for such injuries? Is that remedy adequate and complete? It has long been settled law in this State that it is. *Stetson v. C. & E. I. R. R.*, 75 Ill. 74; *Patterson v. C., D. & V. R. R.*, 75 Ill. 588; *Peoria, etc., R. R. v. Schertz*, 84 Ill. 135; *C. & E. I. R. R. v. Loeb*, 118 Ill. 203; *C. & E. I. R. R. v. Ayers*, 106 Ill. 511; *Pittsb. & Ft. W. R. R. v. Reich*, 101 Ill. 157, 176; *C. & E. I. R. R. v. McAuley*, 121 Ill. 160; *Penn. M. L. I. Co. v. Heiss*, 141 Ill. 35, 58, 59.

The bill in this case is a mere injunction bill to enjoin the carrying out of a great public work. In the case of public works of magnitude, and involving large expense, like railways, a court of equity is much more reluctant to interfere by injunction than in other cases. *High, Inj.*, Sec. 598; *Torrey v. C. & A. Ry.*, 3 C. E. Green 393; *Greenhalgh v. M. & V. Ry. Co.*, 3 Myl. & C. 784; *Hackensack Com. v. N. J. M. Ry.*, 7 C. E. Green, 94; *Booraem v. N. H. C. Ry.*, 40 N. J. Eq. 557.

The bill shows that appellant's property is on the route of the road; there is nothing alleged showing that it is in any way differently affected from every other lot on the different streets along the road. This is not enough. In order to maintain a bill to enjoin the construction of a work of public character, he must show some special injury to his property, which is peculiar thereto. And he must set forth the facts showing or constituting such injury. *Osborne v. Brooklyn R. R.*, 5 Blatchf. 356; *Coast L. R. R. v. Cohen*, 50 Ga. 444-461; *Garnett v. Jacksonville, etc., Ry.*, 20 Fla. 889, 901, 902; *Wood, Nuisances*, Sec. 75; *Dunning v. Aurora*, 40 Ill. 481; *People v. North Chi. Ry.*, 88 Ill. 544; *Patterson v. C., D. & V. R. R.*, 75 Ill. 588; *Stetson v. Chi. & E. R. R.*, 75 Ill. 75; *Peoria, etc., Ry. v. Schertz*, 84 Ill. 135; *Truesdale v. Peoria, etc., Co.*, 101 Ill. 561; *Mills v. Parlin*, 106 Ill. 60; *Chicago v. Un. Bldg. Assn.*, 102 Ill. 379.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

At the time the ordinances permitting the construction of appellee's railway were enacted, there was in existence the following statute :

"The city council or board of trustees shall have no power to grant the use of, or the right to lay down, any railroad tracks in any street of the city, to any steam or horse railroad company, except upon a petition of the owners of the land representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes."

The question here presented is not as to the necessity for such a petition as is prescribed by the statute, but the council having acted upon what purported to be such a petition, and appellee having proceeded under the ordinances, thus obtained, to construct its railway, will a court of equity enjoin the operation of the railway, at the instance of a property holder whose property will be damaged by such operation.

It is manifest that to the city council itself is presented the determination of whether a petition authorizing it to grant the use of a street has been presented. The decision of such question may require the making of surveys, the hearing of evidence, and the examination of titles.

The favored property owners, it would seem, should, if they desire, be heard, in order that the council may come to a correct decision as to this matter; and when it has in good faith determined this matter, there is reason for holding its conclusion to be *quasi* judicial. Black on Judgments, Sec. 532; Bissell v. City of Jeffersonville, 24 How. 287.

Appellant in his bill does not show that any fraud was practiced in obtaining the judgment of the council that the requisite petition had been presented. His allegation is that the signatures of certain owners were by agents; he does not allege that such signatures were unauthorized. The allegation in effect is that a petition containing the requisite signatures was presented, but that the petition itself did not upon its face show that each signature was authorized.

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streets of a city are controlled by the municipal
ities for the benefit of the public. The municipal
ities may, subject to certain restrictions imposed
statute, prescribe the manner in which the streets
e used by the public, may close and vacate them.
& Vincennes R. R. Co. v. The People, 92 Ill. 170;
go and Union Bldg. Ass'n, 102 Ill. 379; Mayer v. Vil-
f Teutopolis, 131 Ill. 522; Carney v. Marseilles, 136
7.

owner has not even a right to the perpetual mainte-
of a street upon which his property abuts; although
y be entitled to recover damages because of the vaca-
f the street by the municipal authorities. Mayer v.
e of Teutopolis, *supra*; Dillon on Municipal Corpora-
Sec. 666.

ile an abutting property owner is by the statute made
a favored class upon whose petition alone can the
l permit the laying of railroad tracks in a street, it
ot follow that to such owner is given a right to insist
he courts shall interfere and protect the rights of the
in respect to the streets.

abutting property owner's right to use the street is
ater than that of each and all of the public. He is
ie of the millions composing the public, and unless he
n from the use to which the street is put by the munic-
authorities, a damage special and peculiar to himself,
not maintain a suit to compel the abandonment of
use; he can not assume to represent the public, and
individual suit conclude its rights. Davis v. Mayer,
r, 663; Winterbottom v. Lord Derby, Law R. 2 Q. B.
Iartshorn v. South Reading, 3 Allen, 501; McDonald
glish, 85 Ill. 232; High on Injunctions, Sec. 762;
roy's Eq. Juris, Sec. 1379; City of East St. Louis v.
n, 119 Ill. 200; City of Chicago v. Union Bldg. Ass'n,
l. 379; Patterson v. C. D. & V. Ry. Co., 75 Ill. 588;
rpoel et al. v. The West and South Towns Ry. Co.,
go Legal News, March 24, 1894.

damage special and peculiar to himself an abutting,

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property owner has, under the constitution and laws of this State, a remedy at law. The fact that by permission to use the street for a particular public purpose, an abutting property owner will be specially damaged, affords no ground for restraining such use, so long as the property holder is able to recover and collect all the damage he suffers. *Vanderpoel v. The West and South Towns Ry. Co.*, *supra*; *Loire v. North Chicago St. Ry. Co.*, 32 Fed. Rep. 270; *People v. Kerr*, 27 N. Y. 188; *Moses v. Pittsburgh R. R.*, 21 Ill. 516, 523; *Stetson v. C. & E. I. R. R.*, 75 Ill. 74; *Patterson v. C. D. & V. R. R.*, *Id.* 588; *Peoria, etc., R. R. v. Schertz*, 84 Ill. 135; *C. & E. I. R. R. v. Loeb*, 118 Ill. 203; *C. & E. I. R. R. v. Ayers*, 106 Ill. 511; *Pittsb. & Ft. W. R. R. v. Reich*, 101 Ill. 157, 176; *C. & E. I. R. R. v. McAuley*, 121 Ill. 161; *Penn., M. & E. I. Co. v. Heiss*, 141 Ill. 35, 58, 59.

In the present case it appears that nineteen months elapsed between the presentation to the council of the petition for permission to construct this railway and the filing of the bill in this case; during this period the appellee did a great deal of work and expended large sums of money, the benefit of which appellant now seeks to deprive it of.

One who would avail himself of the remedy afforded by an injunction should be diligent in the assertion of his rights, and not allow the defendant to go on expending large sums of money in that which an injunction will deprive him of the benefit of. *High on Injunctions*, Secs. 785, 786; *Johnson v. Wyatt*, 11 W. R. 852; *Redfield on Railways*, Vol. 2, Chap. 29, Sec. 16.

So far as appears from the bill filed in this case, not only has appellant a remedy at law for the damage, imperfectly stated, he alleges he will sustain, but he has been guilty of such *laches* as precludes his right to an injunction.

The decree of the Circuit Court dismissing the bill is therefore affirmed.

MR. JUSTICE GARY took no part in the consideration or decision of this case.

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Fergus v. Haupt.

John B. Fergus v. Herman Haupt, Jr.

PRACTICE—*Appeal from Justice's Court.*—Where an action on from a justice of the peace, is pending in the Circuit Court, if the it does not appear, the appellee has the right to elect whether eal shall be dismissed, or he have a judgment for the amount of gment appealed from, and in either case with damages.

MANDAMUS.—Appeal from the Circuit Court of Cook County; the RANK BAKER, Judge, presiding. Heard in this court at the March 1894, and affirmed. Opinion filed April 30, 1894.

opinion states the case.

N D. ADAIR, attorney for appellant.

ERT H. MEADS, attorney for the appellee.

JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

71, Ch. 79, R. S., entitled, "Justices," provides that uses of appeal from judgments of justices of the peace, pellee shall be entitled to judgment not exceeding r cent damages upon the amount of the judgment, if peal is dismissed for want of prosecution, or if the shall be satisfied that the appeal was prosecuted for urpose of delay. And the court may, at the election appellee, render judgment against the appellant for ount of the judgment from which the appeal is taken, amages as hereinbefore provided."

court below held in this case, being an appeal from a of the peace, and reached for trial on the call, and pellant, below as well as here, not appearing, the ap- had the right to elect whether the appeal should be sed, or he should have a judgment of the Circuit Court amount of the judgment appealed from, in either case amages. The appellee chose to take the judgment.

appellant now insists that he could not do that with- rial *de novo*, proving up his case before a jury. The below was right in its construction of the statute,

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which, though not very well expressed, is clear enough in its intent. No multiplying of words would make it plainer.

But, says the appellant, if that is the proper construction, the statute is unconstitutional. If that proposition was fairly debatable, the appellant would be in the inconsistent position of having appealed for relief to a court having no jurisdiction of the question upon which his relief depends.

But holding, as we do, that the proposition is not fairly debatable (*Chaplin v. Commissioners*, 126 Ill. 264), the judgment is affirmed.

Fred Miller Brewing Company v. Robert Beckington.

54	191
55	339

1. BILL OF EXCEPTIONS—*To Be Taken Most Strongly Against the Person Offering It.*—A bill of exceptions is a pleading, to be taken most strongly against him who offers it. Inferences favorable to such party are not to be drawn from it, and uncertainties in it are resolved against him.

Memorandum.—Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed June 4, 1894.

The opinion states the case.

ELISHA WHITTLESEY, JR., attorney for appellant.

ROBERT BECKINGTON, *pro se*.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The bill of exceptions in this case is so defective that we are unable to say what the entire proceedings upon the trial of the cause were, and consequently can not determine whether any of the errors alleged to have been committed during said trial are well assigned.

The bill of exceptions shows that one G. F. Lampey, being called as a witness by the plaintiff, was sworn, and "testified as follows:"

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at examination conducted by Mr. Whittlesey." follows a chattel mortgage, after which is the question: "What is your name?" A. G. F. Lampey."

What along is the following:

"The chattel mortgage identified by the witness was introduced in evidence by counsel for plaintiff, admitted, marked as exhibit A, and is as follows (here insert chattel mortgage)." but no chattel mortgage is there inserted.

It then follows the direction "here insert chattel mortgage." "Counsel for plaintiff then and there offered in evidence a judgment note; following it are introduced the following records: "Acknowledgment on the back of the mortgage, admitted, marked plaintiff's exhibit B, and is as follows (here insert acknowledgment.)" "And also the entry of the recorder admitted, marked plaintiff's exhibit C, and is as follows: (Here insert indorsement.)" "And also the note identified by the witness, admitted, marked plaintiff's exhibit D, and is as follows: (Here insert note.)"

Mr. Lampey, you may examine this other chattel mortgage and this note.

What next? Another one? Whittlesey: Yes, sir."

What next? Another one? Whittlesey: Yes, sir."

What next? Another one?

Whittlesey: Yes, sir."

What next? Another one? Whittlesey: Yes, sir."

What next? Another one? Whittlesey: Yes, sir."

What next? Another one? Whittlesey: Yes, sir."

What next? Another one? Whittlesey: Yes, sir."

What next? Another one? Whittlesey: Yes, sir."

What next? Another one? Whittlesey: Yes, sir."

Frank E. Johnson v. Mathew J. Steffens et al.

1. **CONTRACTS—Enforcement in Equity.**—Courts of equity will not lend themselves to the enforcement of contracts when it appears that the subject-matter possesses no value to the complainant, or a value that rests only in the realms of fancy, speculation, and conjecture, or that is beneath the dignity of the court.

54 193
58 394

Memorandum.—Bill for relief. Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed June 4, 1894.

The opinion states the case.

S. K. DOW and JOSIAH BURNHAM, attorneys for appellant;
DOW, WALKER & WALKER, of counsel.

JOSEPH WRIGHT, attorney for appellees.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION
OF THE COURT.

This was a bill in chancery filed upon an oral agreement to compel Mathew J. Steffens, defendant, to convey to Frank E. Johnson, complainant, an undivided half interest in certain letters patent granted to said Steffens by the United States for a certain invention by which finished photographs could be automatically taken, with or without sunlight, by means of an apparatus which should be set in motion by dropping a coin in the slot, of sufficient value to compensate for the photograph; also for an injunction to prevent Steffens from selling, assigning or transferring said letters patent, by issuing licenses or otherwise; also for a discovery and an accounting.

The defense is, that no such contract as claimed, was made, and the arguments filed in this court on both sides, are mostly devoted to that single issue of fact.

The evidence was taken in open court before the chancellor, and the bill was dismissed for want of equity. Under such circumstances, it would require a much stronger and

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ponderance of evidence than is to be found in this justify a court of review in overthrowing the conclusion of the chancellor upon a question of fact. But we now that the learned chancellor who heard the case dismissed the bill upon the sole ground that the appellant failed by his evidence to establish the alleged con-

thorough examination of the evidence, it would not properly comport with our own views of its effect, to affirm the dismissal of the bill upon the sole ground that the subject-matter of which was the subject of the alleged contract was of insufficient value to be a subject of cognizance in

equity will not lend themselves to the enforcement of contracts when it appears that the subject-matter has no value to the complainant, or a value that rests in the realms of fancy, speculation and conjecture, or beneath the dignity of the court. Story's Equity, Secs. 500-2; Daniell's Chancery Pl. & Pr. 328-9. Withstanding all the hopes and expectations that were centered upon the alleged invention, or the illusive and undertakings which may have at one time been connected with reference to the patent in controversy, it is fully apparent from the evidence, that the patent would never will, possess sufficient value, if any at all, to entitle the appellee to any appreciable extent for his investments on account thereof, which, concededly, must be made before the appellant can have any share. The decree of the Circuit Court is therefore affirmed.

S. Stettauer v. John H. Dwight & James F. Gillette.

CHANCERY PRACTICE—Waiving the Right to a Discovery.—Where a defendant in chancery waives the oath of a defendant to his answer, he waives his right to a discovery from him.

REQUISITES OF A BILL PRAYING RELIEF FROM FRAUD.—To sus-

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tain a bill for relief on the ground of fraud, something more than a mere allegation made upon information that fraud has been committed, is required.

3. *SAME—Laches.*—Where a party during the time covered by certain transactions, received statements showing the transactions made for him, and rested contentedly in reliance upon such statements for more than six years after the last payment of money on account of such transactions, and nearly ten years from the time the dealings were begun, and almost five years from the expiration of the period during which they occurred, he is guilty of *laches*.

Memorandum.—Bill for relief. Error to the Circuit Court of Cook County; the Hon. SAMUEL P. COLLINS, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed March 26, 1894.

The Opinion states the case.

Plaintiffs. W. PLUMMER and WM. J. TEWKESBURY, attorneys for *Defendants* in error.

FRANCIS A. RIDDLE, attorney for defendants in error.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The original bill in this cause was filed November 5, 1887, and, being demurred to, an amended bill was filed June 30, 1890.

A demurrer to the amended bill was sustained, and a further amendment allowed and made on February 17, 1892, and another demurrer having been interposed and heard, the court dismissed the cause for want of equity, at the costs of complainant.

The cause of action alleged by the complainant arose out of some extensive dealings in grain and produce on the Chicago Board of Trade, between the first day of January, 1878, and the thirtieth day of December, 1882, wherein the defendants acted as the brokers and agents of the complainant, and the relief asked is an accounting.

Neither the original bill nor the amended bill was sworn to, and the oath of the defendants to their answers was expressly waived.

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Although such allegations are made as make it appear the complainant depends mainly for a right of recovery upon information peculiarly within the possession and knowledge of the defendants, the bill is not one for discovery.

For anything that appears, the complainant is entitled to relief at law, except his right to a disclosure of matters exclusively within the breast of the defendants, will enable him to maintain a bill of discovery; but by waiving oath of defendants to their answers he disclaims his right to a discovery from the defendants. Chap. 22, Sec. 1, Rev. Stat. Ill.

His right, therefore, to relief in equity, must depend upon whether he makes out a case of fraud, or one for an accounting.

It was alleged that during the time between January 1, 1881, and December 30, 1882, the complainant paid to the defendants a sum in excess of \$150,000 as security, and for interest and commissions for the making of the various transactions in his behalf and on his account, and that the aggregate of said transactions exceeded the sum of \$100,000 in value, and that the transactions were numerous, intricate and complex.

It was also alleged that accounts of the purchases and sales made in behalf of the complainant during the period aforesaid, were from time to time rendered and given to the complainant, but that the same were false, incorrect and fictitious, and did not contain a true and correct account of the trades, deals and transactions made by the defendants and in behalf of the complainant; that a large portion of the purchases and sales were made at one price, and accounts thereof made to the complainant at another and wholly different price; and that another large portion of the purchases and transactions reported to complainant as having been made by the defendants for and in his behalf, were never actually made, but were mere cross-trades, made by the defendants with fictitious persons, and were not actual purchases and sales.

It is averred that the complainant did not keep an account

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of the transactions made for him by the defendants, but relied wholly upon the accounts thereof rendered and furnished to him by the defendants from time to time during the period covered by the transactions, and that most of such accounts rendered have been lost and are not in the complainant's possession; and that the truth of complainant's allegations with reference to the falsity and fictitiousness of said accounts and dealings can only be made to appear by an inspection of the books, accounts and memoranda belonging to the defendants, and covering the period aforesaid of their business operations.

In excuse of the long delay of nearly five years from the close of all transactions between the parties, and of more than six years from the date of the last payment of money by complainant to the defendants, as shown by the last amendment made to the bill, until the commencement of the suit, it is alleged that the complainant was first informed and became aware of the fraudulent dealings of the defendants, on or about the first of October, preceding the month in which the original bill was filed.

Such information was alleged to have been derived from "divers persons, who then and there had positive and intimate knowledge" of the fraud which had been practiced by the defendants upon the complainant, in rendering false, fictitious, unjust and untrue statements of said transactions.

It is, however, nowhere made to appear what particular transaction was fraudulent in the respects named, nor in what particular the transactions were complex or intricate, or different from any other long-continued and numerous dealings partaking of the character of simple purchases and sales of grain and produce, concerning which a court of law can afford full relief.

The alleged information as to the fraudulent character of defendant's dealings, applies to all transactions with as much force as to any single one, and is no more than a general allegation of fraud made upon information.

The complainant does not even allege that he believes the information so derived.

To sustain a bill for relief on the ground of fraud, some-

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ore than a mere general allegation made upon information that fraud has been committed, is required.

statement applies with equal force to all the allegations contained in the bill with reference to fraud.

are vague and indefinite and altogether incapable of sustaining an issue upon, and the bill was properly held to be so demurrer.

the other ground of *laches*, also, we think the bill properly dismissed.

As to the allegations of the bill the transactions alleged to have been within a period of five years beginning January 1, 1878, and ending at the close of December, 1882. The transactions were extensive. As shown by the last amendment to the bill, the first payment of money made by the plaintiff to the defendants was made August 27, 1878, and the last one was made on June 21, 1881.

During all the time covered by the transactions, the plaintiff received from the defendants statements showing transactions made for him, and he rested contentedly in reliance upon those statements for the unreasonably long period of more than six years after the payment by him of money on account of the transactions, and nearly ten years from the time he alleges the dealings to have been made, and almost five years from the expiration of the statute of limitations which he alleges them to have occurred.

The only fact he alleges as a reason for questioning the truth and good faith of such statements after such long delay, is the vague and indefinite information derived from divers persons, already alluded to.

We have no hesitation in holding that the Circuit Court properly dismissed the bill. Affirmed.

H. Williams and James P. Lockwood v. The John Davis Company.

Notes—Rules for Determining Credit.—The "credit" to be given to the testimony of a witness depends upon his ability and opportunity to know what occurred and his disposition to tell the truth.

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2. *SAME—What is Entitled to the Greater Weight.*—It is error to instruct the jury that the statement of a witness having superior opportunities for knowing what took place and superior intelligence and memory, other things being equal, is entitled to the greater weight.

3. *SAME—Interest in the Result.*—The interest of a witness in the result of a suit is not necessarily one of the tests for determining his credibility. His interest is a matter that may be taken into consideration. Nor can it be said as a general rule that a witness who is interested in the result of a suit will not be as honest, candid and fair in his testimony as one who is not.

4. *INSTRUCTIONS—Assuming Facts.*—In an action for work, labor and services, it is error to tell the jury that the plaintiff charged the defendant a certain sum for doing the work where the amount charged is in dispute.

5. *ERROR—Will Not Always Reverse.*—Where the instructions in a case, though erroneous, have not misled the jury, and it appears that substantial justice has been done, the judgment will not be reversed.

Memorandum.—Assumpsit for labor and services. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, A. D. 1894, and affirmed. Opinion filed July 2, 1894.

The opinion states the case.

APPELLANTS' BRIEF, HERMAN B. WICKERSHAM, ATTORNEY.

An interest in the event of the suit does not necessarily detract from the credibility of the witness, as above stated; these are simply circumstances that the jury may take into consideration. *Douglass v. Fullerton*, 7 Brad. 104.

Where an instruction fairly presents the law on the theory of the case, as contended for by the party who asks it, if there is any evidence upon which to base it, it should be given. *Trask v. The People*, 104 Ill. 569.

And where there is evidence of a fact an instruction based on the finding of that fact from the evidence, if the law is applicable to that state of the case, can not be regarded as misleading. *Eames v. Rend*, 105 Ill. 509.

McMURDY & JOB, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit for steam fitting work

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at the premises, being a restaurant, kept by appel-

plaintiff's agent made affidavit that the sum of \$739.32
ue.

defendants filed a plea of the general issue with an
vit of merits, and also filed special pleas, setting up
ges they claimed to have sustained on account of the
tive character of the work.

case came on for trial in November, 1893, with the
of a verdict and judgment for plaintiff of \$589.32.

on this judgment the defendants appeal.

court, at their instance, gave the following instruc-

he jury are instructed that the credit of a witness de-
upon his ability and opportunities to know what
red and his disposition to tell the truth as to the
rence. The statement of a witness having superior op-
nities for knowing what took place and superior intel-
e and memory, other things being equal, is entitled to
reater weight before the jury.

ne of the tests for determining the credibility of a wit-
is his interest in the result of the suit. As a general
a witness who is interested in the result of a suit will
e as honest, candid and fair in his testimony as one who
so interested, but the degree of credit to be given to
and all of the witnesses is a question for the jury
"

s instruction should not have been given. We are not
of any such rule as is announced for determining the
it" to be given to the testimony of a witness. Nor do
ink that the interest of a witness in the result of a
one of the tests for determining his credibility. His
st is a matter that may be and is to be taken into con-
tion. Nor can it be said as a matter of law that as a
al rule a witness who is interested in the result of a
ill not be as honest, candid and fair in his testimony
who is not so interested.

ether this is true as a matter of fact, it is unnecessary

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to discuss, as in this State the court, unfortunately, is not allowed to instruct, or express an opinion upon matters of fact. That this instruction, erroneous as it is, in any way prejudiced the case of appellee, is not made to appear.

Nor should instructions 7 and 8 have been given. They at least each tell the jury that the plaintiff charged the defendant a certain sum for doing the work. The amount charged by the plaintiff was in dispute; a thing which the plaintiff undertook to prove; and the court should not, in an instruction, have assumed that proof thereof had been made.

These instructions do not appear to have done any harm, as the jury did not find for the plaintiff the sum of \$739.32, the amount mentioned therein.

Appellants asked that the jury be instructed that the plaintiff must prove by a preponderance of the evidence how much labor was performed. The jury were not necessarily called upon to do this; they were to find the value of the work done by plaintiff, and in so doing they might have had to consider "the amount of labor performed," but their verdict was to be based upon the value of the work done and materials furnished, or, to make use of a common expression in regard to such transactions, the value of the work done; the expression "work" including materials supplied in doing the work.

We do not think the record of this case free from error. We affirm the judgment entered, because it has not been made to appear that reversible error was committed or that substantial justice has not been done.

This was not a case in which, so far as we can see, the sympathies of the jury were likely to or did lead them to consider unfairly any of the evidence adduced. The record inclines us to the opinion that the plaintiff did not do as good a piece of work as it charged for; the jury seem to have been of the same mind, as it gave the plaintiff a verdict for \$150 less than the amount of the bill it rendered and swore was correct, nearly four years before. The plaintiff has thus been compelled to deduct \$150 from his claim, and

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s lost the use of his money for nearly four years. The defendants have obtained a reduction of \$150, and a delay payment, the interest value of which amounts to nearly much more.

So far as appears from the record of this cause, substantial justice has been done, and the judgment is therefore affirmed.

Emuel E. Gross v. Michael C. Sloan for use E. W. Blatchford et al.

1. **GARNISHMENT—*The Verdict Must Respond to the Issues.***—Unless a verdict responds to the issues no judgment can be rendered upon it. If it varies from the issues in a substantial matter, or if it find only a part of that which is in issue, it is bad.

2. **SAME—*The Rule Applied.***—In garnishment proceedings the garnishee answered the interrogatories denying any indebtedness whatever, and all contractual relation out of which any indebtedness might arise, and to his answer the plaintiff in the garnishee suit filed a general replication. Six years afterward the case was tried, the jury returning a verdict reading: "We the jury, find that there is now due and owing from the garnishee, S. E. G., to the plaintiff, M. C. S.," etc. The verdict was held bad as not responding to the issue.

3. **VERDICTS—*Surplusage Does Not Vitate.***—If the jury find the issue and something more, the latter part of the finding will be rejected as surplusage; but this rule does not apply to a case where the facts found in the verdict are substantially variant from those which are in issue.

4. **SAME—*Substance, Not Form.***—It is not necessary that the verdict should conclude formally to the words of the issue, but the point in issue must be capable of being ascertained out of the finding.

5. **JURY—*Duty in Finding a Verdict.***—It is the duty of the jury to respond to the question of fact submitted to them by the pleadings. Finding a matter which is not in issue, can have no legal effect or validity.

6. **SAME—*Must Respond to all the Issues.***—Juries must, by their verdicts, respond specifically to all the issues made by the pleadings. If they find any one, their verdict will be set aside, or if judgment be rendered thereon it will be erroneous.

Memorandum.—Garnishee proceedings. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding.

Gross v. Sloan.

Heard in this court at the ~~March~~ term, 1894. Reversed and remanded.
Opinion filed April 19, 1894.

The opinion states the case.

YOUNG, MAKEEL & BRADLEY, attorneys for appellant.

WEIGLEY, BULKLEY & GRAY, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

In the month of September, 1887, the appellant was summoned as garnishee in the suit of Blatchford v. the appellee, Sloan. The summons was returnable to the October term, 1887, of the Superior Court.

Interrogatories to the garnishee were filed in apt time and a conditional judgment was rendered against the appellant, garnishee, on October 7, 1887, which was one of the days of the said October term, for the amount of the original judgment theretofore recovered in said suit.

Thereupon a *scire facias* was issued, returnable to the following November term, and was duly served.

The garnishee afterward and in apt time, appeared and filed his answer to said interrogatories, wherein he denied each and every of the interrogatories, and denied fully and completely any indebtedness whatever, and all contractual relations between himself and the said Sloan out of which any indebtedness might arise, and to his answer the plaintiff in the garnishee suit filed a general replication.

Thereafter nothing whatever was done in the cause until at the December term, 1893, six years after the said answer and replication thereto had been filed.

At the last mentioned term the cause was taken up and heard, in the absence of the garnishee, a verdict obtained, and a judgment rendered thereon against him for the sum of \$279.58 and costs.

A motion to set aside the verdict and vacate the judgment made at the same term, was denied, and the garnishee brings the cause here by appeal.

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Verdict of the jury was given in the cause on December 3, 1893. It did not find the issues for the plaintiff, or any general words from which such a finding could be deduced. It simply reads: "We, the jury, find that now due and owing from the garnishee, Samuel E. Gross to the plaintiff, Michael O. Sloan," etc.

There was no such issue presented for trial by the jury. The issues presented by the replication to the answer to the interrogatories, related to a condition of things existing at the time six years before the verdict was rendered, and a set of circumstances and conditions existing at the time of the trial, as to which the garnishee had not been asked and had not answered.

Interrogatories to a garnishee are framed, under the writ, with reference to debts, etc., due and owing at the time of the service of the writ, or at any time thereafter which shall thereafter become due, and the answer by the garnishee denies all indebtedness then due or which may become due in the future, the issue presented by a general replication to such answer can not be extended so as to include indebtedness out of contractual relations that may exist between the garnishee and the principal defendant at the date with reference to which the issue was made, or a verdict that finds there is an amount due on a day subsequent to the date as to which the issues were made is not responsive.

A verdict must respond to the issue, or it will be bad, and judgment can be rendered on it. *Moody v. Keener*, 7 Ala. 218; *Patterson v. United States*, 2 Wheat. 221; *Wheat v. Davis*, 4 How. (U. S.) 131; *Kilbourn v. Waterbury*, (Conn.) 424; *Groves v. Bailey*, 24 Miss. 588; *Moore v. Moore*, 29 Mo. 218; *Brockway v. Kinney*, 2 Johns. 210; *Vines v. Brownrigg*, 2 Dev. (N. C.) Law, 537; *Hillegas v. Hill* (S. C.) 447; *Hardy v. DeLeon*, 5 La. 1; *Ronge v. Dawson*, 2 Wis. 256.

In *Patterson v. United States*, *supra*, it is said:

The rule of law is precise upon this point. A verdict which varies from the issue in a substantial matter, or

if it find only a part of that which is in issue. The reason of the rule is obvious; it results from the nature and the end of the pleading. Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue; and although the court in which the cause is tried may give form to a general finding, so as to make it harmonize with the issue, yet if it appears to that court, or to the Appellate Court, that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict. It is true that if the jury find the issue, and something more, the latter part of the finding will be rejected as surplusage, but this rule does not apply to a case where the facts found in the verdict are substantially variant from those which are in issue."

It is not necessary that the verdict should conclude formally or punctually to the words of the issue, but the point in issue must be ascertained out of the finding, is the way the Supreme Court of Alabama, in *Moody v. Keener*, *supra*, paraphrases the old rule laid down by Hobart.

That it is the duty of the jury to find the very point in issue, to respond to the precise question of fact submitted to their trial by the pleadings, and that their verdict, finding a matter which was not in issue, can have no legal effect or validity, is perfectly well settled, is the statement of the rule made in *Hardy v. DeLeon*, *supra*.

The case of *Groves v. Bailey*, *supra*, was an attachment suit begun on the ground that the defendants "had concealed their effects," so that the plaintiffs' claim could not be made by ordinary process of law.

The defendants pleaded that "they had not concealed their effects so that the plaintiffs' claim could not be made by law." And the plaintiffs replied that "at the time of suing out the attachment, the defendants had concealed their effects so that the plaintiffs' claim could not be made by ordinary process of law."

The jury found: "That the defendants were not concealing their effects at the time of suing out said attachment, so that the claim of the said plaintiffs would be defeated,

d that there was not good cause to sue out the attachment."

On review by the Supreme Court, of the judgment entered on the verdict, it was held that the verdict was not in accordance with the issues; that the fact found by the verdict that the defendants were not concealing their effects at the time of suing out the writ, was immaterial upon the issue, which referred to a concealment that had taken place before the attachment writ was sued out, and not to one then going on.

So, also, in *Ronge v. Dawson*, 9 Wis. 246, it is said: "It may be stated as a general, almost a universal rule, that juries must, by their verdicts, respond specifically to all the issues made by the pleadings; and that if they omit any one, their verdict will be set aside, or if judgment be rendered thereon, it will be erroneous."

As already said, the verdict in this cause contained no words of a general finding, out of which the court could work the verdict into form and make it serve," so as to harmonize with the issue, as would be allowable under the tutelage of jeofails, or under that rule of favor which, without the statute, has always been extended to verdicts.

The rule is laid down by Sir Henry Hobart in his reports, as follows:

'Lay this for a ground, that if the jury find anything that is merely out of the issue, that such a verdict, for so much, is utterly void and of no force, though it conclude in general for or against the plaintiff or the defendant, whereof the reason is plain, which is, that the jurors are tryers of matter of fact put in issue between the parties, and their charge, which contains their commission, is that they shall lawfully try the issue between party and party. And so * * that whatsoever they do try besides the issue is *non juratos*, as a cause judged by the court that had no jurisdiction of the cause *coram non judice*, and utterly void, and a verdict must not be to the action that might have been demanded, but to the issue which is pleaded and in their charge. And if that other point had been pleaded, it might have had another answer and evidence." (Page 53.)

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“But howsoever the verdict seem to stray, and conclude not formally or punctually unto the issue so as you can not find the words of the issue in the verdict, yet if a verdict may be concluded out of it to the point in issue, the court shall work it into form, and make it serve.” (Page 54.)

“But the verdict must not wholly depart from the word of the issue.” (Page 55.)

As said in *Patterson v. United States*, *supra*, the fact found in the verdict, here, is substantially variant from the one in issue.

And, as was held in *Groves v. Bailey*, *supra*, the fact of an indebtedness found by the verdict then, at the time of the verdict, to exist, was immaterial, though true, upon the issue presented by the replication to the answer to the interrogatories as to what was due or to become due, out of relations existing between the garnishee and the principal defendant, at a time six years before.

The point made by the appellee that the bill of exceptions does not purport to set forth the evidence heard by the jury, or all that transpired upon the hearing of the motion to set aside the verdict and vacate the judgment by the court below, is answered by the fact that our decision rests wholly upon what appears on the face of the common law part of the record, viz., the affidavit, process, interrogatories, answer, replication, verdict and judgment.

The verdict not being responsive to the issue, the judgment thereon was erroneous, and will be reversed and the cause remanded.

Patrick Canning v. Neil McMillan.

1. BILL OF EXCEPTIONS—*Agreement to Incorporate in the Transcript.*
—A stipulation that the original bill of exceptions may be incorporated into the record, is void. The bill of exceptions is a part of the record without a stipulation. The statute provides that by agreement the bill may be incorporated in the “transcript of the record.”

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County of Cook v. Barsaloux.

Memorandum.—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1894, and appeal dismissed. Opinion filed May 28, 1894.

KRAFT, WILLIAMS & KRAFT, attorneys for appellant.

WALKER & EDDY, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Acting upon the considerations which moved the Supreme Court in *Van Meter v. Lovis*, 29 Ill. 488, we dismiss this appeal. We are satisfied that the appellant has no case. The bill of exceptions is no part of this record. *Zielmski v. Remus*, 46 Ill. App. 596, has been followed in many cases.

The fact that a stipulation is useless for the purpose expressed in it, is not enough to justify us to read it as effectual for a purpose not expressed. The stipulation is that "the original bill of exceptions * * * may be incorporated * * * into the record," which it would have been without the stipulation. The statute is that by agreement the bill may be incorporated in the "transcript of the record." Appeal dismissed.

County of Cook v. Napoleon Barsaloux, for use, etc.

1. COUNTIES—*Audit of Bills.*—The judgment affirmed upon the authority of *County of Cook v. Ryan*, 51 Ill. App. 190.

Memorandum.—*Assumpsit.* Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed July 1, 1894.

EDWARD J. JUDD, county attorney, for appellant.

GEORGE P. MERRICK, attorney for appellee.

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MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The pleadings on the part of the appellee display considerable originality, but are saved by the stereotyped count for goods sold and delivered.

The appellee proved that he sold and delivered goods to the county, rendered bills, and that the bills were audited and ordered paid by the Board of County Commissioners, as in *County of Cook v. Ryan*, 51 Ill. App. 190.

He has recovered—why does not appear—more than \$300 less than the amount of the bills so ordered paid.

The parties have made their arguments as to the validity of warrants on the county treasury issued to the appellee, but in the view we take of the case it is unnecessary to consider that question.

The judgment is affirmed on the authority of the case cited.

Maggie McCann v. James O'Connell and John McGovern.

1. DECREE—*Do Not Affect Persons Not Parties to the Suit.*—A decree can not affect the judgment creditors of a person not a party to the suit in which it is entered, not themselves parties, and it is immaterial whether their judgments were obtained before bill filed, or *pendente lite*.

2. CHANCERY PRACTICE—*No Affirmative Relief upon an Answer.*—In chancery proceedings no affirmative relief can be granted upon a mere answer; a cross-bill should be filed.

Memorandum.—Bill to remove a cloud upon title. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed July 2, 1894.

The opinion states the case.

APPELLANT'S BRIEF, M. J. DUNNE, ATTORNEY.

A creditor of a trustee can not, even at law, reach the property of the *cestui que trust*. *Smith v. McCann*, 24 How. 398; *Baker v. Copenbarger*, 15 Ill. 103; *Elliott v. Armstrong*,

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ackf. 198; Houston v. Nowland, 7 Gill & J. 480; Bant v. Cousen, 13 All. 50; Ashurst v. Givin, 5 Watts & S. Wilhelm v. Falmer, 6 Barr. 296; Shryoch v. Waggoner, 1a. St. 430; Hart v. Farmers' Bank, 33 Vt. 252; Abell v. re, 43 Vt. 403.

judgment against a trustee personally is not a lien on trust estate. Am. and Eng. Enc. Law, Vol. 12, p. 110; s v. Reger, 102 Ind. 524; Holmdel Co. v. Conover, 34 N. q. 364; Hunt v. Townshend, 31 Mo. 336; Moore v. Flynn l., 135 Ill. 74.

the purchaser of real estate or any interest therein is chargeable with notice of the rights of any person in possession.

Roger v. Lomax, 22 App. 628; Harland v. Eastman, Ill. 22; Weber v. Curtiss, 104 Ill. 309; White v. White, Ill. 460; Haworth v. Taylor, 108 Ill. 275.

proof of possession of land by a party claiming to be the owner in fee, is *prima facie* evidence of his ownership and title in fee simple. Davis v. Easley, 13 Ill. 192; Bargin v. Ebs, 67 Ill. 592; Keith v. Keith, 104 Ill. 397; Harland v. Eastman, 119 Ill. 22; Anderson v. McCormick, 129 Ill. 308. *Notice pendens* is constructive notice; that is, a suit, pending in the public courts, concerning the title to the property purchased, is constructive notice to purchaser. Perry on Contracts, Sec. 223, p. 276, 3 Ed.

Notice pendens is notice to the world of complainant's equity. Douglas v. Davis, 23 Ill. App. 618.

a purchaser *pendente lite* is chargeable with notice of all bills in respect to the subject-matter of his purchase. M. & N. Bank v. Schott, 135 Ill. 669; Grant v. Bennett, 96 Ill. 513; Ellis v. Sisson, 96 Ill. 105.

R. JAMES MAHER, also for appellant.

An assignee of a judgment takes it subject to all the equities subsisting between the original parties, and he will not be protected as a *bona fide* purchaser under such judgment if it shall be erroneous. The assignee does not by assignment become vested with the legal interest, but only a beneficial interest, and he takes the judgment subject to

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all the equities existing against it. *McJelton v. Love*, 13 Ill. 486.

He who meddles with property which is the subject of litigation or of a decree, becomes a party to that litigation or decree; the purchaser of such property or right in property is in reality a party to the proceedings. *Jackson v. Warren*, 32 Ill. 340.

If the assignee, purchaser of a judgment or of a mortgage, has notice of any equities of the real owner of the land, he takes subject to those equities. *Sumner v. Waugh*, 56 Ill. 531.

A purchaser *pendente lite* is concluded. *Gould v. Hendrickson*, 96 Ill. 599.

JAMES O'CONNELL, attorney *pro se*.

P. McHUGH, attorney for John McGovern, appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

December 24, 1891, the appellant filed her bill to remove, as a cloud upon her title, some judgments.

She claimed title under a deed from Thomas McCann to her husband, James McCann, dated January 14, 1889, recorded April 15, 1891, and a deed from her husband to herself dated and recorded June 16, 1891.

O'Connell is the assignee of some judgments against Thomas McCann, on which he claims, however, much less than the nominal amount due upon two of them, one rendered October 4, 1888, for \$600, in favor of Timothy E. Ryan, and one rendered April 26, 1889, for \$1,006.70, in favor of Philip Best Brewing Company. John McGovern has a judgment for \$433.40 against Thomas McCann, rendered March 4, 1891.

All these judgments appear, therefore, to be liens upon the land, being rendered before the deed from Thomas McCann to James McCann was recorded.

The defendant seeks to have them removed, not by reason of any equities in her favor or in favor of her grantor,

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her husband, against the judgments, but upon the ground that February 19, 1889, her husband filed a bill against the wife of Thomas McCann and several others, but not bringing Ryan into the suit, on which bill a decree was entered in favor of her husband. The judgments in favor of the brewing company and McGovern were entered while that suit was pending, the decree therein being entered May 5, 1891.

Now it is perfectly indifferent what may have been the object of the bill by James McCann against the wife of Thomas McCann. No decree in that suit, Thomas McCann not being a party to it, would affect his judgment creditors, not themselves parties, whether their judgments were obtained before the bill was filed, or *pendente lite*. Black on judgments, 534.

And that bill being filed upon a false statement of the relations between Thomas and James McCann, which it would take too much space to demonstrate, no bill to have the benefit of a decree upon it can be maintained. Wadhams v. Gary, 73 Ill. 415.

While the title was in Thomas, James had the possession. Whether that was to defraud the creditors of James, and if so, what figure that cuts as to judgment creditors of Thomas, may be subjects of consideration when the pleadings and evidence present them.

The decree below, however, is wrong in declaring that the judgments mentioned are liens.

All that the appellees were entitled to, was that the bill of the appellant should be dismissed. No affirmative relief can be granted upon a mere answer; a cross-bill should be filed. Purdy v. Henslee, 97 Ill. 389.

The decree of the Superior Court is reversed and the cause remanded with directions to dismiss the bill of the appellant with costs.

Lake Shore Foundry Company v. Adam Rakowski.

1. **DUE CARE**—*Exercise of, a Question of Fact.*—It is a question of fact to be determined by the jury from the evidence, and not a question of law, whether an injured person has exercised ordinary care to avoid injury.

2. **SAME.**—*When the Verdict Will Be Set Aside.*—It is only where the conclusion of want of due care necessarily results from the facts so that all reasonable minds pronounce it so without hesitation, that the court may say as a matter of law that such facts fail to establish the exercise of due diligence and care.

Memorandum.—Action for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed May 28, 1894.

The opinion states the case.

WOLFRED N. LOW and GEORGE E. READ, attorneys for appellant.

O'DONNELL & COGHLAN, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee was employed by the appellant as a general laborer, and on the day he was injured, was required to work a crank used in operating a crane for hoisting heavy weights in the foundry of the appellant.

While so engaged, the crank slipped off the shank of the shaft to which it was applied, and caused the appellee to fall in such a way that one of his hands was caught between some cog wheels that formed a part of the machinery of the crane, and the loss of four of his fingers resulted.

From a judgment of \$3,000 recovered for such injury this appeal is prosecuted.

The cause was submitted to a jury without instructions asked or given, and we are unable to discover any error of law in the record. Indeed the appellant does not claim that

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error, as a matter of law, was committed, unless the argument that the evidence shows exercise of no due care and diligence on the part of the appellee, be so considered.

The evidence disclosed fully all the circumstances connected with the operation of the crane, the method of applying the crank to the shaft, and of retaining it in place, the sufficiency of such methods, the fact that the foreman knew the crank had slipped off on former occasions but the appellee did not know that fact, and how it was the injury occurred.

What is due care, like what is negligence, is a question of fact and not of law. *Lavis v. Wisconsin Central Company*. (No. 5066, this court, filed April 30, 1894.) *Post*.

It was a question of fact for the jury to determine from the evidence whether or not the appellee was in the exercise of due care for his own safety at the time he was injured. *R. R. Co. v. Bailey*, 43 Ill. App. 292.

"We have repeatedly held that it is a question of fact to be determined by the jury from the evidence, and not a question of law, whether an injured party has exercised ordinary care for his safety and to avoid injury." *Ry. Company v. Johnsen*, 135 Ill. 641.

It is only where the conclusion of a want of due care so necessarily results from the facts that all reasonable minds would so pronounce it without hesitation, that the court may say that such facts, as a matter of law, fail to establish diligence by one bound to observe due care.

If fair-minded men may well differ as to the correct conclusion to be drawn from a state of facts, then it is the province of the jury, and not of the court, to determine whether either care or diligence was exercised. *Ry. Company v. Johnsen*, *supra*; *Ill. Cent. R. R. Co. v. Nowicki*, 46 Ill. App. 566.

The only question that has been argued having been passed upon by the jury adversely to the appellant, and no error of law being discovered, the judgment of the Superior Court must be affirmed, and it is so ordered.

B. & O. R. R. Co. v. Stanley.

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Baltimore & Ohio Railroad Company v. William M. Stanley, Administrator of the Estate of Robert Waade, Deceased.

1. **NEGLIGENCE—Controverted Questions of Fact.**—In actions for personal injuries, controverted facts, such as whether the deceased was struck while on the highway crossing, or while trespassing on the right of way, are questions for the jury.

2. **RAILROAD COMPANIES—Street Crossings—Gross Negligence.**—At a place in the suburbs of a populous city (Chicago), where a public street is crossed at a grade by six railroad tracks, used by three great railway systems, it is gross and wanton negligence to operate a railroad without any guard or protection to a traveler whose pleasure or duty might require him to go over the crossing in the night time.

3. **DAMAGES—\$5,000 Not Excessive.**—A person was struck by an engine and killed upon a railroad crossing; he left a widow and two children, aged nine and twelve years respectively. He was a laboring man and earned \$1.50 a day. *It was held* that \$5,000 was not excessive.

4. **SAME—Elements of Damages—Death from Negligent Act.**—In an action to recover damages resulting from death by negligent acts, the value of the services of the deceased in the superintendence, attention to and care of his family and the education of his children, are proper elements of damages.

Memorandum.—Action for damages. Death by negligent acts. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 19, 1894.

The opinion states the case.

APPELLANT'S BRIEF, E. R. JEWETT, ATTORNEY.

It is the duty of a person about to cross a railroad track to look and listen for approaching trains, and the neglect of that duty is such gross negligence as precludes all right of recovery in case of collision. C. & R. I. R. R. Co. v. Still, 19 Ill. 499; G. & C. U. R. R. Co. v. Dill, 22 Ill. 265; C. & A. R. R. Co. v. Gretzner, 46 Ill. 83; T. P. & W. Ry. Co. v. Riley, 47 Ill. 515; St. L., A. & T. H. Ry. Co. v. Manly, 58 Ill. 300; C. & A. R. R. Co. v. Jacobs, 63 Ill. 179; C. B. & Q. R. R. Co. v. Lee, 68 Ill. 576; T., W. & W. Ry. Co. v.

Jones, 76 Ill. 312; C. R. I. & P. R. R. Co. v. Bell, 70 Ill. 102; C. B. & Q. R. R. Co. v. Van Patten, 64 Ill. 516; C., B. & Q. R. R. Co. v. Damerell, 81 Ill. 455; W., St. L. & P. Ry. Co. v. Hicks, 13 Brad. 407.

APPELLEE'S BRIEF, JESSE COX, ATTORNEY.

Railroad companies, in operating their cars in crossing public highways, must so regulate the speed of their trains, and give such signals to persons passing, that all may be apprised of the danger of crossing the railroad track; and a failure of any of these duties on their part, will render them liable for injuries inflicted and for wrongs resulting from such omissions. R. R. I. & St. L. R. R. Co. v. Hillmer, 72 Ill. 235; C. & R. I. R. R. Co. v. Still, 19 Ill. 508.

Where railroad companies cover a public street with a large number of tracks, they must observe unusual care and take extra precautions to avoid injury to persons passing along the street or sidewalk. L. S. & M. S. Ry. Co. v. Johnson, 135 Ill. 649.

The omission of a person approaching a railway crossing to look and listen for a coming train does not necessarily, and as a matter of law, constitute negligence. T., St. L. & N. R. R. Co. v. Kline, 135 Ill. 49; T. H. & I. R. R. Co. v. Voelker, 129 Ill. 540; Penna. Co. v. Kean, 41 Ill. App. 317; J. & E. I. R. R. Co. v. Tilton, 26 Ill. App. 362.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This action was brought for the killing of one Robert Waade, on February 20, 1888.

The theory of the declaration, and that only upon which the appellee sought to recover, was, that the deceased was struck and killed by a locomotive engine belonging to, and operated by the appellant, while the deceased was attempting to cross the appellant's railroad tracks at their crossing of 67th street, a public highway then in Hyde Park, but now in Chicago.

No question is made but that 67th street is, and was at the

time the injury was done, a public highway, nor but that Waade was killed in some manner, at or near the crossing of such highway by the appellant's tracks at the time charged.

The railroad right of way at the crossing of 67th street runs in nearly a due north and south course, and was occupied by six tracks, numbered from the west, for convenience of designation, from one to six, which were used by the Illinois Central, Michigan Central and Baltimore & Ohio Railroad companies. Tracks one and two were used exclusively by the Illinois Central Company for its suburban passenger business; tracks three and four for the through passenger trains of the three companies, and tracks five and six for the through freight traffic of the three companies.

At a point between seven and eight hundred feet south of 67th street crossing, a branch of the Illinois Central road switches off to the eastward, and about seven hundred feet further on, the Baltimore & Ohio junction with its main line going eastward, is made.

All passenger trains of the Baltimore & Ohio Company going to the east, must therefore switch off from track three or four and cross over tracks five and six, in order to get upon its own main line, which from that point begins to take an easterly course.

The home of the deceased, Waade, was on a street lying south of 67th street and east of the railroad. It was testified that he had been on an errand to a point north of 67th street and west of the railroad, and that he was struck by the locomotive when going eastwardly across the railroad on 67th street on his way home. It was between ten and eleven o'clock at night.

On the part of the defendant there was evidence to show that the deceased was not on the 67th street crossing when he was struck, but was going southwardly on the railroad right-of-way, south of the crossing of 67th street, and it is certain that the body of the deceased was found on the tracks near a switchman's shanty, some seven or eight hundred feet south of 67th street.

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he testimony of three witnesses, one of whom was Waade's companion on the errand upon which he had been engaged was walking homeward with him, and was but two or three steps behind him when crossing the tracks at the moment of the approach and passing of the locomotive which aimed to have struck him, and the other two of whom were in the wagon which was waiting at the crossing for the train to pass, and who recognized the deceased and his companion as they walked past the wagon and entered upon the tracks, if true, makes it altogether improbable, if not impossible, that Waade could have walked down the tracks to the point where his body was found in time to have been struck there by any train which passed between the time when he entered upon the tracks and when his body was found, and makes it reasonably certain that his body was struck by the locomotive which, without contradiction, did pass 67th street, very soon after he entered upon the tracks.

he testimony of the switchman, McCarthy, and the fact that the body being found near the switch house, and the shape of the locomotive end, is all that tends to rebut the evidence of the plaintiff tending to show that the deceased was within the limits of 67th street when struck by the locomotive.

the weight of McCarthy's testimony was a matter for the jury to pass upon, and that they did not permit it to control them in their conclusion that Waade was struck while on the crossing of the highway we think was justifiable.

his identification of the two men he met a few minutes before Waade was hurt, as Waade and his companion, Mann, was far from positive or convincing. He expressly testified that he did not recognize the men he met and spoke of at the time of meeting them, and that it was not until after the accident had happened that he identified the injured man and Mann, as the same persons he had met a few minutes earlier.

the jury might well have concluded that he was mis-

taken, and especially so, when, if he was correct as to the time when he met the men with whom he spoke, they would, if continuing on their course, as he said they did, have reached a point far beyond the place where Waade's body was found, before the accident occurred.

There was testimony that tended to show that because of the peculiar construction or form of the front end of the Baltimore & Ohio locomotive that passed there going south at the time of the accident, the body of a person struck by it could not have been carried so far as from 67th street to the switch house, without falling off. There is very little room for argument upon a proposition involving what may or may not have happened to the body of a man struck by the front end of a rapidly moving locomotive, between the place where it was run against and the spot where it was subsequently found.

"The unexpected always happens," is a common proverb, and "the things which are impossible with men are possible with God," is an utterance of one possessed of greater than human wisdom; and the jury may well have dismissed that proposition from their consideration in reliance upon the authority of either of those sayings, if they found that Waade was run against, at the crossing, by a locomotive moving at the rate of twenty miles an hour.

It is strongly insisted that the evidence failed to establish that, assuming the accident to have happened at the street crossing, it was caused by the appellant's locomotive.

The accident occurred in the night-time, and the identification of the train which passed at the time the injury happened, depended to a considerable extent upon the sense of sight of the witnesses of the appellee who were present or near by.

There were two freight trains standing on the tracks numbered five and six, one bound north, on track five, and the other bound south, on track six. These two trains seem to have been waiting for the setting of certain switches and for the passing of an Illinois Central suburban train, and of a Baltimore & Ohio through passenger train. The switch-

man, McCarthy, testified, in behalf of the appellant, that the two passenger trains were due at 67th street at nearly the same time, the suburban train at thirty-seven minutes past ten o'clock, and the Baltimore & Ohio at forty-nine minutes past ten. He further testified that after the Illinois Central suburban train had passed he set the switches on the sixth track for the Baltimore & Ohio train to pass, and after that train had passed he then set up the switches on the fourth and fifth tracks for the freight train that was coming from the south, and then went up again to the sixth track, and set the switch for the freight train that was coming from the north.

It was then that he heard the man groaning by the switchman's shanty and stopped the freight trains. He also testified that the route of the Baltimore & Ohio train was by a switch from the fourth to the sixth track, and that when opposite his shanty, where the body was found, the train was on the sixth track, and that the body was found there not more than three or four minutes after that train passed. He also testified that no other train passed there between the time of the passing of the Illinois Central suburban, and that of the Baltimore & Ohio.

It seems from McCarthy's testimony alone, pretty certain that if Waale was killed by any train, it must have been by that of the Baltimore & Ohio.

Adding to his testimony that of the witnesses for appellee, who identified the train that crossed 67th street at the moment when, according to their testimony, Waade disappeared, as the Baltimore & Ohio train, and we can not avoid the conclusion that he was killed by appellant's locomotive.

It is urged that such a want of care and caution by the deceased is shown as precludes a recovery.

The controverted fact of whether the deceased was struck while on the highway crossing, or while trespassing on the appellant's right of way, was settled by the verdict of the jury, adversely to the appellant, and the conduct of the appellant and of the deceased at that place, at the time of

the accident, will determine whether there was such a lack of care and caution exercised as to bar appellee from a right of recovery.

Here was a public highway crossed at grade by six railroad tracks occupied and used by three great railway systems.

The particular point was in the suburbs of a populous city. In addition to the ordinary through passenger and freight traffic carried on by each of the railways, one of them conducted a suburban passenger traffic requiring frequent trains. The evidence discloses that no gates or flag-man guarded the crossing. Four trains, two for freight and two for passengers, approached the crossing at nearly the same time, moving in different directions, or were standing waiting for the setting of switches over which to proceed. Under such circumstances the deceased was bound to exercise such care and caution as a reasonable and ordinarily prudent person would exercise, and no more; that the team and wagon driven by the witness, Corcoran, should have halted and waited for the trains to pass before crossing the tracks, affords no such guide to the situation as to have made it imperative upon Waade and his companion to have waited an equal length of time before attempting to cross, or be charged with undue negligence. A man on foot may, under such circumstances, go with comparative safety into many places and move forward many times, when it would be unsafe for a team and wagon to be driven. Julius Mann, who was in company with the deceased, testified that as they went upon the tracks he observed a freight train coming from the south at such a distance as they could easily pass before it; that he looked and could see nothing coming from the north; that Waade was about three steps ahead of him; that suddenly, and after they had gone three or four steps, a train came down "as quick as lightning" from the north; that as soon as the train had passed he looked around for Waade but he had disappeared; that the train "came on the middle track," and that he heard no whistle and heard no bell.

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Corcoran, the teamster, and Herman Mann, who was riding with him, both testified that they heard no whistle or bell, and that the train was moving at from fifteen to twenty miles an hour.

There was evidence on appellant's behalf that the bell on the locomotive drawing appellant's train, which passed 67th street at the hour the accident is claimed to have occurred, was rung as it approached and passed over the crossing, and there was evidence that the train was not running at over four or five miles an hour, and if it were our province to determine questions of fact it might be a question of some difficulty as to which set of witnesses was telling the truth, specially as to the speed of the train; but such questions are for the jury, and, except for much weightier reasons than we are able to gather, it is not for us to say the jury was wrong.

There seems to be no doubt but that there were no gates to guard the crossing; and no flagman to warn passers, and at such a crossing as this one was shown to be, it would be somewhat violent conclusion for either a jury or a court to say that it was not gross and wanton negligence on the part of the railroad company to operate its road without any guard or protection to a traveler whose pleasure or duty might require him to go over the crossing in the night-time.

But whether that be so or not, it does, we think, appear sufficiently to sustain the jury's finding, that the deceased was in the exercise of such reasonable care for himself as an ordinarily prudent man would exert under like conditions. That Julius Mann was not also struck at the same time, was not due to the exercise by him of any greater prudence than exercised by Waade, for although he saw the freight train that was approaching from the south, he did not see or hear the appellant's passenger train that came upon them from the north until at the instant that Waade was, as is aimed, hit, but his safety and escape lay in the mere fact that he was about three steps behind Waade.

Much fault is found with the exclusion by the court of a

part of the instructions asked by the appellant and the substitution therefor of one given by the court of its own motion, but we fail to discover any reasonable justification for complaint in that regard. The substituted instruction included everything that was material and competent in the appellant's refused instructions, and in our view presented the whole of the law of the case to the jury, in a manner concise, easily understood, and worthy of imitation.

All the given instructions were as follows:

The court of its own motion gave to the jury the following instruction:

1. In this case the jury may properly, first, from the evidence, determine whether or not the deceased was struck and killed by an engine of the defendant company, for unless from the evidence you believe that he was struck and killed by an engine of the defendant company, you must find the defendant not guilty. But it does not follow that if you believe from the evidence that deceased was struck and killed by an engine of the defendant company that you should find the defendant guilty, but in that case, that is, if you, from the evidence, believe that the engine of the defendant company struck and killed the deceased, it will be your duty to consider and from the evidence determine the other questions in the case, and in that case, first, to determine from the evidence where the deceased was when he was struck. The plaintiff alleges that the deceased was struck at 67th street, while he was passing along 67th street over and across the railroad tracks, and this is denied by the defendant company. Unless from the evidence you believe that deceased was struck by the engine of defendant while deceased was passing along 67th street over and across the railroad tracks, you must find the defendant not guilty; or in other words, if, from the evidence, you believe that the deceased was struck and killed by an engine of the defendant, and further believe from the evidence that deceased, when he was struck by such engine, was not passing along 67th street, but was on the railroad track several hundred feet from 67th street, then you must find that the evidence

does not support the allegation of plaintiff that deceased was struck while passing along 67th street, and that unless you find that that allegation has been proved you must find the defendant not guilty. But it does not follow, gentlemen of the jury, that if you find first, that deceased was struck and killed by an engine of defendant, and that he was struck by such engine while passing along 67th street, that you should find the defendant guilty. But in that case, it will be your duty to consider the other questions in the case, and for your guidance and instruction upon that branch of the case, the court gives the following instructions:

Thereupon the court gave to the jury, on behalf of the plaintiff, the following instructions, to wit:

If the jury believe, from the evidence, that in the month of February, 1888, Robert Waade attempted to cross the track used by the defendant to run its cars upon, at and over a certain highway or street known as 67th street, in Cook county, Illinois, and that while the said Robert Waade was crossing or attempting to cross over the defendant's track at said place he was struck and killed by a locomotive engine operated by the defendant, and if the jury believe from the evidence that the said injury to the said Robert Waade was caused by the negligence of the servants or employes of the defendant in charge of the said locomotive engine, and if the jury further believe from the evidence that the said Robert Waade, at the time of and just prior to his receiving said injury, was exercising due and proper care and was using due and reasonable care and means to foresee and prevent said injury, and if the jury further find from the evidence that the plaintiff in this case is the personal representative of the said Robert Waade, and that said Robert Waade, at the time of his death, left a widow and children, and the said widow and children have sustained pecuniary damage by reason of the death of the said Robert Waade, then the jury should find the defendant guilty.

The jury are instructed that reasonable care and caution required of the deceased, as mentioned in these instructions, means that degree of care and caution which might reasonably be expected from an ordinarily prudent person under

the circumstances which they shall find from the evidence surrounded the deceased at the time of the alleged injury.

Whereupon the court of its own motion then gave to the jury the following instruction, to wit:

It follows from what has been said that in order to find a verdict of guilty in this case, you must, from the evidence, believe, first, that deceased was struck and killed by an engine of the defendant company; second, that he was so struck and killed at the crossing of 67th street and the railroad tracks; third, that at and just before the time he was so struck, deceased was exercising reasonable care and caution for his own safety; fourth, that the defendant company was guilty of negligence in the management of its trains and engines as charged in the declaration, and that such negligence was the cause of, or contributed to the injury of the deceased; and unless you find all of said facts in favor of the plaintiff you must find the defendant not guilty; and if you, from the evidence, find all of said facts in favor of the plaintiff and against the defendant, then you must find the defendant guilty; then it will be your duty to assess plaintiff's damages, and upon that branch of the case the court gives you the following instructions:

The court then instructed the jury on behalf of the plaintiff, as follows:

The jury are instructed that if they find the defendant guilty from the evidence, and under the instructions of the court, then, in assessing the plaintiff's damages, they may properly take into consideration the pecuniary loss and damage, if any, which they shall find from the evidence that the widow and children of said Robert Waade have sustained by reason of the death of the said Robert Waade.

And the court, of its own motion, then gave to the jury the following instruction, to wit:

All questions of fact are for you, gentlemen of the jury, and upon no question of fact has the court the right to give you any instruction, and no instruction given is to be regarded as any expression or intimation of any opinion on the part of the court upon any question of fact.

And thereupon the court gave to the jury, on behalf of the defendant, the following instructions, to wit:

If the jury believe from the evidence that the deceased went upon the track at the 67th street crossing, knowing that the said crossing was at the time occupied by a train of the defendant, and also by other trains, then the jury are instructed that it was such an act of negligence on the part of the deceased as will bar a right to recover.

The jury are instructed that at a railroad crossing an engine and train have the prior right of passage, and that if deceased knew or could have known by the exercise of ordinary prudence, that a train was crossing, or about to cross, he was guilty of negligence in going upon said crossing, and under the pleadings and proof in this case can not recover.

It is assigned as error that the damages awarded are excessive.

The verdict and judgment are for \$5,000. The deceased left a widow and two children, aged nine and twelve years, respectively. He was a laboring man and earned \$1.50 a day.

What the exact measure of compensation is under such conditions has never been fixed, and probably never can be. The legislature has wisely fixed a limit beyond which juries may not go, but within that limit the discretion of the jury can seldom be declared to be so disproportioned to the actual pecuniary loss to the surviving widow and children as to warrant a reversal on that ground.

It would require the whole amount of the judgment to be invested at a higher rate of interest than is lawful by the laws of this State, to produce an income equal to the annual earnings of the deceased if regularly employed on the secular days of the year.

Moreover, there are other elements than the mere probable earnings or wages of a man, that are entitled to be considered in arriving at the full pecuniary compensation.

In a case where the appellant here was likewise the appellant, Baltimore & Ohio R. R. Co. v. Wightman, 29 Grattan,

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431, it was held, there might be added to the probable earnings of the deceased during what would probably have been the remainder of his lifetime, the value of his services in the superintendence, attention to, and care of his family and the education of his children, of which they have been deprived by his death, and what was said in *Tilley v. Hudson River R. R. Co.*, 29 New York, 252, was there quoted with approval:

“All these are elements of pecuniary success, component parts of that pecuniary capital, of the continued exercise and employment of which the children were entitled to the benefits, and of which the wrongful act of the defendants deprived them.”

In no view of the case that has been suggested to us are we able to find any material error in the record, and the judgment of the Circuit Court will therefore be affirmed.

S. F. Hess & Co., a Corporation, etc., v. William H. Heegaard.

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1. PRINCIPAL AND AGENT—*Authority to Bind Not Enlarged, When.*—The consideration or inducement which moves an agent to undertake to bind his principal, does not enlarge the authority to bind.

Memorandum.—Assumpsit and set-off. Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed April 30, 1894.

The opinion states the case.

APPELLANT'S BRIEF, MORRIS ST. P. THOMAS, ATTORNEY.

A general agent of a corporation has no implied authority to make promissory notes in the name of his principal. *Chicago Electric Light Renting Co. v. Hutchinson*, 25 Ill. App. 476; *N. Y. Iron Mine v. First Natl. Bank of Negaunee*, 39 Mich. 644; *McCullough v. Moss*, 5 Denio, 567.

APPELLEE'S BRIEF, ASHCRAFT & GORDON, ATTORNEYS.

A general agent is one empowered to transact all his principal's business. 1 Parson on Cont., 40; Home Life Insurance Company v. Pierce, 75 Ill. 426, 435.

An agent, the principal being absent, having full charge, management and control of the business of the principal, must necessarily possess and exercise the same power and authority in the business that his principal could if present. A general agency, until revoked, is co-extensive in scope and duration with the business. The German Fire Ins. Co. v. Grunert, 112 Ill. 68.

Power to act generally in a particular business or a particular course of trade, will constitute a general agency, if this is so indicated, no matter what the private instructions of an agent may be. The extent of the authority of an agent should not be confounded with the nature of the agency; but his action will bind his principal, in either case, within the general scope of the authority which the world has been permitted to suppose he possesses. The authority of an agent may be shown by his acts about the business of his principal, and the previous course of dealing by the agent is proper evidence. Doan et al. v. Duncan, 17 Ill. 272.

Power to act generally in a particular business or a particular course of trade in a business, however limited, would constitute a general agency, if the agent is so held out to the world, howsoever restricted his private instructions may be. Crain v. National Bank, 114 Ill. 516, 526.

An agent may make himself liable to his principal for an act done in excess of his authority, and yet the principal be responsible to third persons for the act, if done within the scope of the agent's apparent authority. Hurd v. Maple, 10 Brad. 420.

Making the contract was within the apparent scope of the authority of J. E. Avery. Home Life Ins. Co. v. Pierce, 75 Ill. 426, 435; 1 Parsons Cont., 40; Fire Ins. Co. v. Grunert, 112 Ill. 68; Doan et al. v. Duncan, 17 Ill. 272; Crain v. Bank, 114 Ill. 516, 526; Hurd v. Maple, 10 Brad. 420.

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J. E. Avery made the contract on behalf of S. F. Hess & Co., and not for himself. *Hypes v. Griffin*, Admr., etc., 89 Ill. 134; *Western Union R. R. Co. v. Smith*, 75 Ill. 496; *Nash v. Towne*, 5 Wall. 689; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; *Rich., Fred. & Pot. R. R. Co. v. Smead*, 19 Gratt. 354; *Barker v. Garvey*, 83 Ill. 186; *Scanlan v. Keith*, 102 Ill. 641; *Brockway v. Allen*, 17 Wend. 40; *La Salle Nat. Bk. v. Tolu, Rock & Rye Co.*, 14 Brad. 141.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant, a corporation, sued the appellee for goods sold and delivered, upon an account substantially undisputed. The defense was a set-off exceeding the demand sued upon.

For the purposes of this opinion it is assumed that J. E. Avery was the general western agent of the appellant, and resident of Chicago, where the appellee was in business.

Cigarettes were the goods principally dealt in between the parties.

The appellant was a manufacturer in Rochester, N. Y., and a fierce competition was raging between it and a monopoly named American Tobacco Company, for the trade of buyers.

The American Tobacco Company were offering a special rebate of thirty cents per thousand on cigarettes bought of it, to buyers who would buy of no one else. To induce the appellee to continue buying of the appellant, Avery gave to the appellee this writing:

“CHICAGO, May 28, 1890.

Messrs. W. H. Heegaard & Co., City.

GENTLEMEN:—We, in consideration of your handling our cigarettes, guarantee that you will receive the rebate of 30 c. pr. M. on all cigarettes you handle manufactured by the Amer. Tob. Co., or its branches, from April 1st, 1890, until April 1st, 1891.

Yours truly,

J. E. AVERY, Gen'l. Agt.

S. F. HESS & Co.,

Rochester, N. Y.”

There is no evidence that the home office of the appellant, or any person therewith connected, had any knowledge of

that writing until all dealings between the parties had ceased; nor is there any evidence of any ratification of it, nor of any similar transaction with anybody.

The appellant did settle with another customer upon the terms of this writing:

“Confidential.

May 27th.

Messrs. A. Meyer & Co., 141 La Salle Street, Chicago:

GENTLEMEN:—In consideration of the friendship you have extended to us in the fight against the cigarette combine, we hereby authorize you, when you remit to S. F. Hess & Co., to take off, in addition to the regular trade discount of ten per cent and two and one-half off for cash, a special discount also of two and one-half per cent, which arrangement please consider strictly private.

Yours, etc.,

J. E. AVERY,

Gen'l Agt. S. F. Hess & Co.”

The distinction between the two writings is obvious. The latter contains terms upon which goods sold by appellant might be paid for.

It concerned the business of the appellant only, and as a general agent may do for his principal such acts, within the general scope of the business intrusted to the agent, as the principal might do, the terms of sale of the goods were within the authority of the agent. But the first paper was a collateral undertaking to answer for the conduct of a competitor. The consideration or inducement which moves an agent to undertake or bind his principal, does not enlarge the authority to bind.

The principle has been often applied to partners. See Bates on Partnership, Sec. 320 *et seq.*

The set-off claimed by, and allowed to, the appellee, was for the rebates that he did not receive from the American Tobacco Company. It is unnecessary to go through the details of the case, as the real question is whether the appellant was bound to make good to the appellee, the rebates, if the American Tobacco Company would not allow them.

Holding that the appellant was not bound, the judgment is reversed and the cause remanded.

Frank N. Gage v. George W. Houts.

1. **BILL OF EXCEPTIONS—*Agreement To Have the Original Incorporated in the Transcript.***—An agreement in the words and figures following, “It is hereby stipulated and agreed by and between the parties hereto, and their respective attorneys, that the original bill of exceptions may be incorporated in the record in said cause in lieu of a copy thereof,” is a mere stipulation that the original bill of exceptions shall be a part of the record of the cause as it stood in the Circuit Court and is not a compliance with the statute. Sec. 68, Chap. 53, entitled Fees and Salaries.

Memorandum.—Assumpsit for money had and received. Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 30, 1894.

The opinion states the case.

NEWMAN & NORTHRUP and S. O. LEVINSON, attorneys for appellant.

THOMAS W. PRINDIVILLE, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

On an appeal by the appellant to the Circuit Court, from a judgment recovered against him by the appellee in a suit before a justice of the peace, judgment was again rendered against the appellant, and this appeal is from that judgment.

The suit was to recover back four small sums of money paid by appellee under a contract for the purchase of a lot of land, entered into by the appellee during his minority.

Question is made as to the admissibility in evidence, over the objection of appellant, of certain paper writings, purporting to be signed in the name of appellant by an agent, without proof of the authority of the agent.

But we may not inquire into the question, for there is

before us no bill of exceptions to which we may look to ascertain what was there proved.

The certificate of the circuit clerk to the transcript of the record is, that what he certifies to is a true transcript of the record except the bill of exceptions, the original of which is incorporated into the record by stipulation of parties.

It is only by virtue of the statute (Sec. 68, Chap. 53, entitled Fees and Salaries), that, when the parties so agree, the original bill of exceptions, instead of a copy, may be incorporated into the transcript of the record for the Appellate or Supreme Court.

The clerk's certificate of the fact of such an agreement, if it were so expressed, is, and could be, no evidence of it. Had such an agreement been embodied in the bill of exceptions, and thereby have borne the stamp of authenticity afforded by the signature of the trial judge, the requirements of the statute would have been fully met.

Or had there been a separate stipulation, evidencing such an agreement, as is usually done, it would be sufficient.

Where, as here, no such agreement is embodied in the bill of exceptions, we will, as in duty bound, look elsewhere in the transcript to find, if we can, the agreement, as evidenced by the stipulation referred to by the clerk.

So looking in this case, we do find a stipulation entitled in the suit of Houts v. Gage, in the Circuit Court, in words and figures as follows:

"It is hereby stipulated and agreed by and between the parties hereto and their respective attorneys that the original bill of exceptions may be incorporated in the record in said cause in lieu of a copy thereof.

(Signed) THOMAS W. PRINDIVILLE,
Plaintiff's Attorney.

NEWMAN & NORTHRUP and
S. O. LEVINSON,

Defendant's Attorneys."

But we find no other stipulation touching the bill of exceptions.

No one looking at that stipulation can find anything

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within it indicating that an appeal to this court, or any other, was in the contemplation of the parties to it.

It is a mere stipulation that the original bill of exceptions should be a part of the record of the cause as it stood in the Circuit Court, and nothing more.

We can not, without forcing upon one or the other of the parties to it, an interpretation which may not have been within his intention, give to that stipulation an effect not at all within its very plain wording.

This court has repeatedly held that such a stipulation is no compliance with the statute. *Overman v. Consolidated Coal Company*, 51 Ill. App 289, and cases there referred to.

We must, therefore, presume that the Circuit Court had before it ample evidence to sustain its judgment, and, for the same reason, we must presume that the cause was properly placed and heard upon the short cause calendar.

The judgment of the Circuit Court is affirmed.

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James D. Ulery v. The Chicago Live Stock Exchange.

1. **LIBEL AND SLANDER—Pleading—Innuendo Can Not Perform the Office of a Colloquium.**—An innuendo can not perform the office of a colloquium, nor can it extend the meaning of defamatory matter unless by reference to matter of inducement.

2. **LIBEL—What is, Under the Statute.**—The statute makes it unlawful to post or distribute any written notice with the malicious intent wrongfully and wickedly to injure the person, character, business, employment or property of another.

3. **SAME—Sufficiency of Declaration.**—The declaration averred that the defendant unlawfully and maliciously intended to injure and destroy the business of the plaintiff; such is not the language of the statute. Under it, the malicious intent must be "Wrongfully and wickedly to injure." A publication to be unlawful and actionable, must be within the terms of the statute.

4. **SAME—Not Actionable in Itself.**—A person with or without reason, may refuse to trade with another; so may ten or fifty persons refuse. An individual may advise his neighbor or friend not to trade with another neighbor; he may even command when the command amounts only to

earnest advice. It is not an unlawful interference with the trade of another to advise people to deal with his competitor, or to decline to do business with him, nor is it unlawful to combine to raise the rate of wages.

5. SAME—*A Publication Not Actionable per se.*—The following publication is not libelous *per se*.

“THE CHICAGO LIVE STOCK EXCHANGE,
OFFICE OF SECRETARY.

TO MEMBERS OF THE EXCHANGE :

You are hereby directed not to employ Mr. J. D. U——, in the live stock commission business, or to transact any business with him at the Union Stock Yards of Chicago, Illinois, until you are notified that the said U——, has settled with Messrs. K—— & S., for twenty head of cattle, bought of them on the 25th of January, A. D. 1898.

THE BOARD OF DIRECTORS OF THE
CHICAGO LIVE STOCK EXCHANGE,
By C. W. B——, Secretary.”

Memorandum.—Action for libel. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 19, 1894.

APPELLANT'S BRIEF, LEMMA & COPE, ATTORNEYS.

Words not actionable in themselves become so when published of one engaged in a particular calling or profession, and proof of special damage is unnecessary. *Clifford v. Cochrane*, 10 Brad. 574; *Brown v. Vanaman*, 55 N. W. Rep. 183; *Nelson v. Brochenius*, 52 Ill. 236; *Tremmer v. Hiscock*, 27 Hun, 364; *McDonald v. Lord*, 27 Ill. App. 111; *Blumhardt v. Bohr*, 17 Atl. Rep. 266, 70 Md. 328.

It is not necessary to aver special damages, if any injurious imputation be made affecting plaintiff in his office, profession or business, nor if the slander be propagated by printing, writing, picture or effigy. *Starkie on Libel and Slander*, 105; *Gauvreau v. Superior Rub. Co.*, 62 Wis. 403; *Newell on Libel and Slander*, 849.

The declaration in this case avers special damages in this language: “Insomuch that the members of said Exchange” and others have refused and do still refuse to have anything to do with plaintiff in said business.

In an action of slander by an innkeeper a proof of a gen-

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eral loss of custom is sufficient to sustain the action without naming particular customers. Newell on Libel and Slander, 780; Starkie on Libel and Slander, 426; Missouri Pac. Ry. Co. v. Richmond, 11 S. W. 555, 73 Tex. 568; Weiss v. Whittemore, 28 Mich. 366.

As to whether the publication constitutes a libel, see Newell on Libel and Slander, Chap. 4, page 42; McDonald v. Lord, 27 Ill. App.; Hays v. Mather, 15 App. 30; Gault v. Babbit, 1 Brad. 130; Lapham v. Noble, 54 Fed. 108; State v. Armstrong, Mo. 16 S. W. 604; Truth Pub. Co. v. Reed, 13 Ky. L. R. 323; Arrow Steamship Co. v. Bennett, 25 N. Y. S. 1029; Sec. 177 Crim. Code of Ill. "Libel."

It is for the court to say whether a publication is reasonably susceptible of the meaning ascribed to it in the innuendo, and for the jury to say if such is the true construction. Hays v. Mather, 15 Ill. App. 30; Mitchell v. Sharon, 57 Fed. Rep. 424.

APPELLEE'S BRIEF, PECK, MILLER & STARR, ATTORNEYS.

Where a charge arises out of a written instrument, the instrument must be set out in the declaration; and the defendant has the right to admit all the facts charged, if he chooses, and to have the judgment of the court as to whether such facts amount to a cause of action. The defendant is not bound to put the question as a mixed question of law and fact to the jury; he has a right to put it as a question of law to the court. 2 Addison on Torts, 4th Eng. Ed. 923; Wright v. Clements, 3 B. & A. 509; Wood v. Brown, 6 Taunt. 169; Odgers on Libel and Slander, 536-7; Gunning v. Appleton, 58 How. Pr. 472.

A demurrer does not admit the charge of malicious intent. Mitchell v. Sharon, 51 Fed. Rep. 424; Gunning v. Appleton, 58 How. Pr. 472.

The office of an innuendo is not to enlarge the meaning of the words employed in an alleged libel, but merely to point out their application to facts previously averred. The words are to be construed in their ordinary, plain and popular sense. Blagg v. Stewart, 10 Ad. & E. 899; Bradley v.

Cramer, 59 Wis. 312, 313; Capitol & C. B. L. v. Henty, L. R. 7 H. L. 744; Fleischmann v. Bennett, 87 N. Y. 238; Van Vechten v. Hopkins, 5 Johns. 211; Newell on Libel and Slander, 619, 620.

The notice was not libelous *per se*. Miller v. David, L. R. 9 C. P. 1187; Sherry v. Perkins, 147 Mass. 212.

Statements necessary to protect the defendants are privileged. Odgers on Libel and Slander, 199, 229; Newell on Libel and Slander, 388; 2 Addison on Torts, 4th Eng. Ed., 931; Blackham v. Pugh, 2 C. B. R. 611; Lawler v. Anglo-Egyptian Cotton Co., L. R. Q. B. 262; Somerville v. Hawkins, 10 C. B. 583; Jenoure v. Delmege, L. R. 1891, App. C. 73.

If a communication was warranted by any reasonable occasion or exigency and honestly made, such communication is privileged, for the common convenience and welfare of society; and the law has not restricted such privilege within any narrow limits. 2 Addison on Torts, 4 Eng. Ed. 931.

It is also well settled that where the alleged libel was in the nature of a privileged communication, the plaintiff must aver in the declaration that the communication was both false and groundless. Newell on Libel and Slander, 391; Thorn v. Blanchard, 5 Johns. 529; Vanderzee v. McGregor, 12 Wend. 545, note; O'Donaghue v. McGovern, 23 Wend. 26; Howard v. Thompson, 21 Wend. 319-29; 2 Greenleaf on Evidence, Sec. 410, note; Born v. Rosenow, 54 N. W. Rep. 1089; Young v. Richardson, 4 Brad. 364.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action for an alleged libel, as well as for an injury to the business of appellant, said to have been maliciously inflicted.

The declaration, after setting forth the existence and business of appellee as a corporation, and that appellant was a live stock broker, and was in good credit and repute as such broker, and enjoying an income of \$5,000 per annum therefrom, charges that appellee, for the purpose of injuring

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him in his said business, and to prevent others from dealing with him, published of him the following:

“THE CHICAGO LIVE STOCK EXCHANGE, }
OFFICE OF SECRETARY.

To Members of the Exchange:

You are hereby directed not to employ Mr. J. D. Ulery (meaning plaintiff) in the live stock commission business, or to transact any business with him at the Union Stock Yards of Chicago, Illinois, until you are notified that the said Ulery has settled with Messrs. Keenan & Sons for twenty head of cattle, bought of them on the 25th of January, A. D. 1893.

THE BOARD OF DIRECTORS OF THE
CHICAGO LIVE STOCK EXCHANGE,
By C. W. BAKER, Secretary.”

Meaning, etc., by said publication to cause it to be understood and to falsely charge that the plaintiff was unworthy of trust and confidence.

“By means whereof the plaintiff has been greatly injured in his good name and credit, and fallen into great discredit; insomuch that the members of said exchange, and others, have refused, and do still refuse to buy or sell or have anything to do with plaintiff in his said business.”

A second count, after setting forth the large amount of business done by members of the Live Stock Exchange, amounting to more than \$30,000,000 per annum, and that it was a corporation conducted for the purpose of enforcing rules regulating the buying and selling of live stock at the yards where it is located, and that its power was such that no person did or could pursue the business of selling live stock, who was not a member of said corporation, goes on as follows:

“By means of a combination of a large number of persons engaged in the live stock commission business in said market, in a corporate body, under the conditions and for the purposes aforesaid, the said corporation possessed the power of controlling the said business and preventing the sale of the stock by said commission merchants and by others, to any person whom the said defendant might elect

to exclude from dealing in said market, and to prevent any such person from receiving employment in connection with said business; and on, to wit, the 20th day of June, 1893, the said defendant, unlawfully and maliciously intending to injure and destroy the said business of plaintiff, and prevent him from buying and selling live stock in said market, and from receiving employment from others, did cause to be posted at said stock yards, in a public place on the bulletin board commonly used by said defendant in the announcement of its orders and notices, in a building occupied by said defendant as Live Stock Exchange Building, the following order:" (As set forth in first count.)

"And the defendant caused said order to remain so posted and displayed from said time until, to wit, the 10th day of September, 1893; and the same yet remains so posted and in full force, as the order and command of said defendant; and the said order was, during said time, accepted and observed and is still accepted and observed by the members of said corporation; and in consequence thereof, the plaintiff lost his said employment as salesman for said Drum, Flado & Company; the members of said corporation, during said time, refused and continue to refuse to deal with plaintiff in any manner whatever, or to in any manner employ him in any matter connected with said business. And in consequence of the premises, the plaintiff has been, and is wholly unable to continue in said business, and is deprived of all employment in said stock yards; all of which is to the damage of said plaintiff in the sum of fifty thousand dollars (\$50,000), and therefore he brings suit.

A general demurrer to the declaration was sustained.

In respect to the publication complained of it is to be noticed:

First, that it is not libelous *per se*. Sherry v. Perkins, 147 Mass. 212.

Second, that if the intimation contained therein, that the plaintiff has not settled for certain cattle bought be true, it does not follow that the plaintiff has done any unworthy act, or anything that should cause him, or would be likely to cause him, loss of custom or credit.

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For aught that appears, he may have had the best of reasons for not settling for such cattle.

Third, the declaration fails to allege that anything said or intimated in the writing was in any wise untrue.

Fourth, there is in the declaration neither statement, colloquium or innuendo by which it is made to appear that the plaintiff had bought any cattle of Messrs. Keenan & Sons, or had any occasion for settling with them for anything, or that any person in consequence of the publication had been led to believe that he had failed to settle with Messrs. Keenan & Sons.

The charge of the declaration in this regard is that the defendant meant by the publication to falsely charge that he (the plaintiff) in his said business was unworthy of trust and confidence.

This is, for a pleading, a most obvious enlargement of the necessary as well as the natural meaning of the language actually used.

An innuendo can not perform the office of a colloquium, nor can it extend the meaning of defamatory matter unless by reference to matter of inducement. Townsend on Slander & Libel, 580, 581; Blagg v. Stewart, 10 Ad. & E. 899; Bradley v. Cramer, 59 Wis. 312, 313; Capitol & C. B. L. v. Henty, L. R. 7 H. L. 744; Fleischmann v. Bennett, 87 N. Y. 238; Van Vechten v. Hopkins, 5 Johns. 211.

Considered as an action for libel, the declaration presents no case.

Treating the cause as an action for an injury maliciously inflicted, is the declaration sufficient?

Under this view, the act of the defendant is that of directing its members not to trade with the plaintiff.

The second count is said to be sufficient under the statute of 1874, Sec. 46 of the Criminal Code.

That statute makes it unlawful to post or distribute any written notice with the malicious intent, *wrongfully and wickedly*, to injure the person, character, business or employment or property of another.

The declaration avers that the defendant unlawfully and

maliciously intended to injure and destroy the business of the plaintiff; such is not the language of the statute. Under it the malicious intent must be "wrongfully and wickedly to injure."

If the publication, but for the statute, was lawful, then the publication, to be unlawful and actionable, must be within the terms of the statute.

It is urged that the defendant possessed the means of enforcing obedience to its order, and that therefore its command not to deal with the plaintiff furnishes a basis for an action.

Argumentatively, it is set forth that the defendant possessed such power, but no facts showing such argument to be well founded, are alleged, and we are not aware of any such power.

It may be that under its rules a disobedience of the order by one of the members of the exchange would have rendered him liable to expulsion; no such rule is set forth, and we can not presume that there is any. Whether such a rule could be enforced is a question we are not called upon to discuss. So far as appears, if the members of the exchange have obeyed the order, their action has been purely voluntary.

The act of the defendant is not shown to have been unlawful, or to have been done in an unlawful manner.

The plaintiff's action is for an injury resulting from the doing of a lawful act in a lawful manner.

A person, with or without reason, may refuse to trade with another; so may ten or fifty persons refuse.

An individual may advise his neighbor or friend not to trade with another neighbor; he may even command, when the command amounts only to earnest advice.

The act here complained of is not a nuisance as were the acts enjoined in *Sherry v. Perkins*, 147 Mass. 212. Nor was the defendant's act riotous, tumultuous, or one tending to a breach of the peace; nor was it a conspiracy to do an unlawful act.

It is not an unlawful interference with the trade of

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another to advise people to deal with his competitor, or to decline to do business with him. Nor is it now unlawful to combine to raise the rate of wages. *More v. Bennett*, 41 Ill. App. 164; *Heywood v. Tillson*, 75 Me. 231; *Payne v. Western Ry.*, 13 Lea 81 (Tenn.) 507; *Mogul Steamship Co. v. McGregor*, 21 Q. B. Div. 544; 23 Q. B. Div. 598; L. R. App. Cas., 1892, p. 25; *Bohn Mfg. Co. v. Hollis*, 55 N. W. Rep. 1119; *Carew v. Rutherford*, 106 Mass. 1.

The case of *Walker v. Cronin*, 107 Mass. 555, upon which appellant relies, was an action for enticing away servants; that has always been a sufficient cause of action. *Wood on Master and Servant*, Sec. 230.

The fact that such advice is given with a bad or malicious motive, does not render it unlawful or actionable. The law does not ordinarily consider the motives by which people are actuated to lawful acts, while motive plays a very important part when unlawful proceedings are under consideration.

So far as appears from the declaration filed in this case, the defendant has done nothing unlawful; its conduct may have resulted in injury to the plaintiff, but is not for that reason alone actionable. The judgment of the Superior Court is affirmed.

MR. JUSTICE GARY.

The declaration implies that the defendants enforced among its members, rules and regulations intended to regulate business upon business principles, requiring integrity and punctuality, and that the plaintiff was charged with the want of one or the other of those qualities.

To show a cause of action his declaration should negative all ground for imputing blame to him. To maintain an action for a wrong done to him, he must show that such wrong was done.

If he had bought twenty head of cattle of Keenan & Sons, and did not pay for them, the members of the department ought to stop dealing with him, and the defendant was right in notifying its members of the facts and their duty.

B. A. Morgan v. Archibald Campbell.

54	242
54	436
54	647
54	242
55	351
54	242
60	550
54	242
64	597
54	242
67	160
67	315

1. JUDGMENT—*Recitals, Not Evidence When Set Aside.*—When a judgment is set aside the recitals in it cease to have any force as evidence.

2. APPEALS—*When Appellant is in Default, the Appeal, Not the Cause, May Be Dismissed.*—On an appeal in the Circuit Court, from a justice of the peace, when the cause is reached for trial, if the appellant does not appear, the appeal, not the suit, may be dismissed for want of prosecution with procedendo to the justice.

3. COSTS—*On Dismissal of the Suit.*—When a cause is dismissed, the court can not adjudge costs against the defendant.

4. RULES OF COURT—*In the Record on Appeal.*—A rule of the trial court can not be introduced into the cause for the first time in the Appellate Court. The clerk of the trial court can certify the record of the suit in which the appeal is taken, and if any matter extraneous to the record proper is to be presented, it must come in a bill of exceptions, if in law, or a certificate of evidence, if in chancery.

5. PRACTICE—*Status of Parties on Dismissal of Suit.*—By an order of court dismissing the suit, the parties are out of court. Jurisdiction over them is at an end, and they stand as they did before the commencement of the suit.

6. JURISDICTION—*Of Parties on Dismissal after the Term Has Passed.*—Jurisdiction having been once lost, and the term passed, the record must show that it was regained, and how, or the judgment has no basis. The failure of the record to show notice of a motion to reinstate a case dismissed at a former term, is fatal.

7. SET-OFF—*Right of Trial on in Plaintiff's Absence.*—Under Sec. 30 of Chap. 110, R. S., entitled "Practice," where the defendant interposes a plea or notice of set-off he may try the case *ex parte*, and recover a judgment on a set-off, in the absence of the plaintiff, if he does not appear when the case is called for trial.

8. NON-SUIT—*Before the Practice Act.*—Before the passage of the act of 1873, a defendant could not have a trial in the absence of the plaintiff; all that the could have was a non-suit.

9. PLEADING—*A Set-off in Writing.*—In cases in the Circuit Court pending on appeal from justice's court, if the defendant desires to avail himself of a set-off, he must file his plea thereof or give the required notice in writing.

Memorandum.—Assumpsit. Error to the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1894, and reversed. Opinion filed March 26, 1894.

The opinion states the case.

Morgan v. Campbell.

BRIEF OF PLAINTIFF IN ERROR, H. B. SPURLOCK, ATTORNEY.

That the court had no jurisdiction at the subsequent June term to set aside the order of dismissal and judgment entered May 23, 1892 (the May term), has been settled beyond question by the repeated decisions of this, as well as of the Supreme Court of this State. *Dunkelman v. H. Brunnell*, 44 Ill. App. 438.

Where a suit pending on appeal from a justice was irregularly dismissed for want of prosecution, the court had no authority, at the next term, to reinstate it. *Smith v. Wilson*, 26 Ill. 186; *Fox v. Quinn*, 75 Ill. 232, and *Hunt v. Baldwin*, 27 Ill. App. 446.

Complaint of irregularity in disposing of an appeal suit in the Circuit Court, comes too late at a subsequent term. Court can not vacate judgment after term. *Cook v. Wood*, 24 Ill. 295; *Coursen v. Hixon*, 78 Ill. 339; *Becker v. Santer*, 89 Ill. 596.

P. J. O'SHEA, attorney for defendant in error.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Morgan sued Campbell before a justice and recovered. Campbell appealed to the Circuit Court. There Campbell obtained a verdict upon a trial in which both parties took part, finding "the issues in the set-off in favor of the defendant, and" assessing "his damages at ninety-six dollars." There is nothing else in the record to indicate that there was any set-off, and the court set the verdict aside. Being set aside, no recital in it is evidence of anything. *Black on Judgments*, 682.

Seven months later, on the 23d day of May, 1892, appears on the record this entry:

"MRS. A. B. MORGAN	} Appeal.
VS.	
ARCHIBALD CAMPBELL.	

This cause this day being called for trial, and the appellant failing to prosecute his appeal in this behalf, it is ordered that said cause be, and the same is hereby dismissed at appellant's cost for want of prosecution.

Therefore it is considered by the court that the appellee do have and recover of and from the appellant her costs and charges in this behalf as well as in the court below expended, and have execution therefor."

This order was irregular, for if the appellant there—Campbell—was in default, not the cause, but the appeal, should have been dismissed with the procedendo to the justice. And when a cause is dismissed, the court should not adjudge costs against the defendant, even if it is dismissed for a bad reason.

The appellee has asked leave to assign as a cross-error, that "the court below erred in dismissing the appeal for the reason that he was not warranted in so doing by any rule of said Circuit Court, or by any rule of law for such case made or provided;" and has filed here a certified copy of a rule of the Circuit Court, entered March 13, 1892.

The application to assign that cross-error is denied. The appeal was not dismissed, but the cause was, so that there is no foundation for assigning error on the dismissal of that appeal. Nor can we look at a rule of the Circuit Court brought here in the way this is. The clerk of the Circuit Court can certify to this court the record of the cause in which the appeal or writ of error is; if any matter extraneous to the record proper is to be presented, it must come in a bill of exceptions—if at law—or a certificate of evidence if in chancery, though perhaps if such certified copy were filed in the cause as part of the proceedings there in a chancery suit, it would thereby be a part of the record, as depositions are. But in no way can it be introduced into the cause for the first time here.

We are not advised of any decision in point, but the practice is shown in *Consolidated Rapid Transit, etc., v. O'Neill*, 25 Ill. App. 313, and *Illinois Central v. Haskins*, 115 Ill. 300.

By the order dismissing the cause the parties were out of court, jurisdiction of the court over them was gone, and they stood as they were before the suit was commenced.

The transcript contains a petition filed July 14, 1892, the

Morgan v. Campbell.

contents of which we need not comment upon, and an order entered the same day as follows:

“MRS. B. A. MORGAN vs. ARCHIBALD CAMPBELL.	}	Appeal by defendant.
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On motion of said defendant, by his attorney, predicated on notice and affidavit, it is ordered by the court that the order of dismissal and judgment entered herein on May 23, 1892, be, and the same is hereby set aside and vacated, and that said appeal be, and it is, reinstated upon the docket of this court.”

That under the 66th section of the Practice Act of 1872, substituting a motion for the common law writ of error *coram nobis*, there possibly, not probably, might have been a case warranting the action of the court, may be admitted; but that writ and the proceedings upon it, would have been a part of the record. See the proceedings in *Dennis v. Dennis*, 2 Saunders 328.

No *sci. fa.* is there shown, as the plaintiff in the original suit appeared voluntarily; if she had not, a *sci. fa.* would have been necessary. Bacon Abr., title Error F.

There is no other proof of notice of the application to reinstate the case, than the words “predicated on notice” contained in the order reinstating. Notice to whom and of what, is mere conjecture. The record must show that the court had jurisdiction of the person of the party affected by the judgment. *Wilson v. Greathouse*, 1 Scam. 174; *Clemson v. Harum*, 1 Scam. 176.

Jurisdiction having been once lost, and the term passed, the record must show that it was regained, and how, or the judgment has no basis. In *Sweeney v. People*, 28 Ill. 208, it is said that “on a writ of error, the party, to retain his judgment, must show a good record.” In *Miller v. Glass*, 14 Ill. App. 177, that rule was applied to a case, which, being remanded by this court to the Superior Court of Cook County, was there disposed of, and the record did not show that the party against whom the judgment went, had been notified that the remanding order had been filed. Hettrick

v. Wilson, 12 Ohio St. 136, is also there cited as authority, in which the Ohio court held, that the failure of the record to show notice of a motion to reinstate a case dismissed at a former term was fatal.

It is there said: "It has been suggested that where the record is silent on the subject, we must presume that the defendant below was regularly in court. But we can not so hold in this case. For, however we might presume in favor of the validity of a judgment, where the parties are shown to have been before the court, and where they could, therefore, have made the error complained of appear affirmatively by exception or otherwise, yet no such presumption can be admitted to prevent the direct impeachment of a judgment, where the subject of the complaint is that the party has had no day in court, and so had no opportunity of placing anything upon the record."

Whenever the case arises it may be necessary to hold that a motion and notice, preserved in the files, which have been used in lieu of the common law writ of error *coram nobis* and *scire facias*, under section 66, are, as they take the place of what would be record without bill of exceptions, also record without such bill; but that question is not before us. We might stop here, by reversing without remanding, as there can be no further proceedings below in a case which was there finally terminated long before the judgment brought before us by this writ of error. *Ditch v. Edward*, 1 Scam. 127, followed in *Imperial Building Co. v. Cook*, 46 Ill. App. 279.

After the case was reinstated fourteen months passed, with no appearance by the plaintiff below as well as here, and then, on the appearance of Campbell only, the case was tried, and he obtained a verdict and judgment against Morgan for \$200, so that Morgan is just that much, with costs, worse off than he would have been had he not sued Campbell at all.

Now, before the statute of 1872, to be hereinafter considered, a defendant could not have a trial in the absence of the plaintiff. All that the defendant could have was a non-

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suit. McAllister, J., in Seavey v. Rogers, 69 Ill. 534; Anderson v. Shaw, 3 Bingham 290; E. C. L. 147.

Now, as to the statute, Sec. 30 of the Practice Act of 1872, reads, "When such plea or notice of set-off is interposed, the plaintiff shall not be permitted to dismiss his suit without the consent of the defendant, or leave of the court." This is a statute entitled "An act in regard to practice in courts of record," and the words "such plea or notice of set-off" refer to the next preceding section providing for a plea or notice which must be formal and written. In cases commenced before a justice no such written plea or notice is necessary, either before the justice or on appeal, and, if permissible, there was none in this case. It is true that Sec. 74 of the Justice Act says that "the plaintiff in the justice's court shall be plaintiff in the Appellate Court, on the trial of the appeal, and the rights of the parties shall be the same as in original actions."

We concede "original actions" means actions commenced in the court where the appeal is pending; and among the rights of the defendant in such actions is that of trying the case *ex parte*, and recovering a judgment on a set-off, when a "plea of notice of set-off is interposed," in the absence of the plaintiff, if he does not appear when the case is called for trial. East St. Louis v. Thomas, 102 Ill. 453.

That right is under section 30, before quoted; but without straining the words of that section they can not apply to a case where no plea or notice was in fact "interposed," nor to a class of cases in which, in practice, no such plea or notice ever is "interposed." Section 74 entitles either party to a jury of twelve, instructions to the jury, exceptions to rulings of the court, etc., but without doing violence to language which, without enlarging its operation, works a serious innovation upon the common law. Section 30 does not extend to a defendant on an appeal, a right which depends upon conditions which a defendant on an appeal never complies with.

If this were the only error the case would be remanded, but there can be no further proceedings, as before said. The judgment is reversed only.

54	248
58	382
54	248
59	377
59	419
156s	397
54	248
60	402
54	248
100	1228

F. A. Hodson and William R. Fleming v. The Eugene Glass Co.

1. MASTER IN CHANCERY—*Exceptions to Report—How Far Regarded.*—Exceptions to a master's report are to be regarded so far only as they are supported by the special statements of the master, or by evidence which ought to be brought before the court by reference to the particular testimony on which the exception relies.

2. SAME—*When the Court is Justified in Overruling Exceptions.*—The chancellor will be justified in overruling exceptions to the master's conclusions for the reason alone, that the particular evidence relied upon to sustain such exceptions is not pointed out so that it can be found without searching either through a mass of evidence or unnecessarily through any part thereof.

Memorandum.—Bill for injunction. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed March 26, 1894.

STATEMENT OF THE CASE.

Appellee filed in the Circuit Court its bill for an injunction and for other relief.

The bill set forth that the company, appellee, was capitalized for \$10,000; that on February 2, 1891, Wm. R. Fleming recorded a chattel mortgage purporting to have been made by appellee, September 14, 1892, to secure a pretended debt of \$4,000 due from appellee to said Fleming, said sum being evidenced by a note payable eight months after date, executed by appellee on September 14, 1892. That said note and mortgage are fraudulent, as to appellee, no such indebtedness as is represented therein having ever existed. That on February 2, 1893, the agent of F. A. Hodson, who pretended to be an innocent purchaser of said note and mortgage with said Fleming and others, took possession of the office and factory of appellee in Chicago, expelled the workmen of appellee therefrom, closed the doors thereof, and refused to permit any one to enter said office or factory.

That appellee is solvent, doing a large and prosperous

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business; but that unless restrained by order of court, Hodson will destroy its credit and ruin its business, he threatening to foreclose the said fraudulent chattel mortgage and to carry away the stock and fixtures of appellee; that said Fleming is insolvent and appellee believes no judgment could be collected from said Hodson, whom it is alleged is not a *bona fide* or innocent holder of said note or mortgage.

The bill was answered by defendants and various other proceedings were had. The cause having been referred to a master, testimony was taken before him; the master made a report favorable to the complainant and the court thereon rendered a decree, setting aside the note and mortgage as fraudulent and void, and perpetually enjoining any attempt to collect or foreclose the same.

R. C. BUSSE and SEVERY & GALLOWAY, attorneys for appellants.

WOOLFOLK & BROWNING, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It is urged that the bill does not make a cause for the interposition of a court of equity, and certainly not for the granting of an injunction; that the injunction was to restrain what was at the most but a trespass, and that for such trespass appellee had a perfect remedy at law.

It is quite immaterial whether the bill presented a case authorizing the issue of a preliminary injunction. From such injunction order no appeal was taken. The perpetual injunction ordered in the decree is merely auxiliary to the other relief granted; the note and mortgage being canceled by the decree, whether in addition thereto appellants are enjoined from attempting to collect the same, can make no substantial difference.

Appellants urge that the finding of a master and the decree that the note and mortgage are invalid, and that the appellant Hodson is not a *bona fide* purchaser of the note, are each unwarranted by the evidence.

Seventeen exceptions were taken to the master's report.

The exceptions, instead of pointing out the evidence, which, it is claimed, shows the conclusions of the master to be unwarranted, and by reference to the pages of the proofs returned by the master with his report, making it easy for the court to find upon what the exceptions are based in effect, calls upon the chancellor to search through the evidence and find, if he can, that which will justify the exceptions.

Exceptions are to be regarded so far only as they are supported by the special statements of the master, or by evidence which ought to be brought before the court by reference to the particular testimony on which the exception relies. *Hardy v. Handy*, 11 Wheaton, 103-127; *Miller v. Whittier*, 36 Me. 577.

The chancellor would have been justified in overruling the exceptions to the master's conclusions upon the facts, for the reason, alone, that the particular evidence relied upon to sustain such exceptions, was not pointed out with such definiteness that it could easily be found without searching, either through the mass of evidence, or unnecessarily through any part thereof. *Brown v. McKay*, 51 Ill. App. 295.

We have examined the abstracts filed by appellants and appellee, and we see no sufficient reason for thinking that the Circuit Court came to an erroneous conclusion, and its decree is affirmed.

54	250
59	76
54	250
102	424

Horatio R. Wilson and Oliver W. Marble v. The Baillargeon Interior Building Co., a Corporation.

1. RECORDS—"That Which Doth Not Appear Doth Not Exist."—Where the clerk of the Circuit Court has certified a complete transcript of the record below, and in it is no plea, it must be taken as true that no plea was ever in the case, and that, notwithstanding the judgment entry says "issues being joined" there never was an issue.

2. PLEADING—*Averring a Duty*.—An averment of a duty without

Wilson v. Baillargeon Interior Bldg. Co.

stating facts from which the law will imply the duty, is insufficient; and where the issues have been joined on such an allegation the objection is good after verdict in arrest of judgment.

Memorandum.—Error to the Circuit Court of Cook County; the Hon. ELBRIDGE HANECY, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed March 26, 1894.

The opinion states the case.

W. HECKMAN, J. G. ELSDON and CRAFT & STEVENS, attorneys for plaintiffs in error.

GEO. E. SWARTZ and W. E. HUGHES, attorneys for defendant in error.*

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The clerk of the Circuit Court has certified a complete transcript of the record below, and in it is no plea; it must be taken as true that no plea was ever in the case; and that, notwithstanding that the judgment entry says "issues being joined," there never was an issue. But if there had been, the judgment could not be sustained. The declaration shows no cause of action, and that is an objection always open to the defendant when he brings a case into a court of review and assigns it as error. *Chi., Mil. & St. Paul Ry. v. Hoyt*, 50 Ill. App. 583; *Chi. & E. I. R. R. v. Hines*, 132 Ill. 161.

We have often said, citing many authorities, that averring, without stating facts from which the law will imply, the duty, is useless. *Funk v. Piper*, 50 Ill. App. 163. And after verdict, where issue has in terms been joined on the allegation of duty, the objection avails in arrest of judgment. *Seymour v. Maddox*, 16 Q. B. 71; E. C. L. 326.

Now, here it is averred that the defendant in error was a building contractor; had furnished a large amount of materials for a building; that the plaintiffs in error were the architects; that it was their duty to issue architect's certificates, which duty they maliciously refused to perform.

*Messrs. Swartz and Hughes were retained in this case after it had reached the Appellate Court on error. They had no connection whatever with it in the Circuit Court.—Reporter.

No statement in any form from which any inference can arise that between the owner and contractor there was a contract providing for certificates, and that the architects had accepted a position by which they assumed the performance of such a duty.

It is useless to consider other errors assigned. The declaration is bad, and the judgment is reversed and the cause remanded.

John T. Lester v. The People of the State of Illinois.

1. APPELLATE COURT PRACTICE—*Cases Held Pending Decisions of the Supreme Court.*—Where a case is held pending a decision of the Supreme Court, involving the same questions, judgment will be entered as of the date the case was submitted.

Memorandum.—Appeal from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding. Heard in this court at the October term, 1889. Opinion filed July 5, 1894.

The opinion states the case.

JOHN S. COOK and JOHN N. JEWETT, attorneys for appellant.

THOMAS J. SUTHERLAND, attorney for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This case was submitted to this court for decision on the 17th day of January, 1890. Since then the appellant has died. My then colleagues have resigned the judicial office, but the court remains.

The decision has been withheld awaiting the action of the Supreme Court in another case of the same title, and in all substantial respects the same in principle as this.

That case being now finally determined in favor of the appellant there, the judgment in this case is reversed.

The judgment will be entered as of the date the case was submitted. *Frazier v. Caruthers*, 44 Ill. App. 61.

Pitrowsky v. J. W. Reedy Elevator Mfg. Co.

**Marianna Pitrowsky, Administratrix of the Estate of
Anton Pitrowsky, Deceased, v. The J. W. Reedy
Elevator Manufacturing Company.**

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63 437

1. **MASTER AND SERVANT—Contributory Negligence.**—Where it appears that if there was any negligence on the part of the master, it was negligence of which the servant had knowledge, there can be no recovery of damages.

Memorandum.—Action for damages. Death from negligent act. Error to the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 19, 1894.

The opinion states the case.

GIBBONS, KAVANAGH & O'DONNELL, attorneys for plaintiff in error.

BURTON & O'BRIEN, attorneys for defendant in error.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action brought to recover damages occasioned by the death of Anton Pitrowsky, who, while working for appellee in a foundry, was caught by a revolving shaft, and killed. No one saw him caught. All that is known is that he was told to get a flask, flasks being piled near the shaft, and that he started to go to the place where the flasks were; the next seen of him he was being whirled about by the shaft.

The shaft was supported by a hanger extending about twenty inches below the ceiling; on this hanger the shaft ran, being held in place by collars and set screws; none of these things were boxed or guarded.

The deceased, quite likely, in reaching for a flask, stepped upon a pile of flasks and so came in contact with the revolving shaft.

The plaintiff pleaded the following ordinance of the city

of Chicago, and insisted that by reason of non-compliance therewith the accident occurred.

“Sec. 1974. In every factory, workshop, or other place or structure where machinery is employed, the belting, shafting, gearing, elevators and every other thing where so located as to endanger the lives and limbs of those employed therein, while in the discharge of their duties, shall be as far as practicable so covered or guarded as to insure against any injury to such employes.”

The deceased was some twenty-nine years old, and had been at work in the shop where he was injured for a year.

It does not appear that there was anything in the situation, character or condition of the shaft and its surroundings with which the deceased was not entirely familiar.

If there was any negligence on the part of appellee it was negligence of which the deceased had knowledge. There was therefore no case presented warranting a recovery of damages. Beach on Contributory Negligence, Sec. 343; Moulton v. Gage, 138 Mass. 390; Stephenson v. Duncan, 73 Wis. 404; Evans v. Chessmond, 38 Ill. App. 615; Chicago Packing & Provision Co. v. Rohan, 47 Ill. App. 640; E. St. L. P. & P. Co. v. Hightower, 92 Ill. 139; Mo. Furnace Co. v. Ahend, 107 Ill. 44; I. B. & W. R. R. Co. v. Flannagan, 77 Ill. 365; Ch. & G. W. R. R. Co. v. Travis, 44 Ill. App. 466.

The court properly instructed the jury to find for the defendant, and its judgment is affirmed.

Henry A. Foster, Administrator of the Estate of James Heeney, Deceased, v. Andrew Onderdonk.

1. PERSONAL INJURIES—*Exercise of Ordinary Care to Be Shown.*—It is indispensable in an action to recover damages, occasioned by the neglect of another, that the exercise of ordinary care by the injured party be shown.

Memorandum.—Action for personal injuries. Error to the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Foster v. Onderdonk.

Heard in this court at the March term, 1894, and affirmed. Opinion filed March 26, 1894.

The opinion states the case.

E. J. McARDLE and Wm. P. HAYS, attorneys for plaintiff in error.

WALKER & EDDY, attorneys for defendant in error.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action brought by the administrator of James Heeney, deceased, to recover for the pecuniary loss sustained by his widow by reason of his death, caused, it was alleged, by the negligence of the defendant. The declaration contains three counts to which the defendant interposed a plea of general issue. On the trial at the close of the plaintiff's testimony, the defendant moved the court to exclude the plaintiff's evidence, and direct a verdict for him. This motion was overruled, and the defendant declining to offer evidence, the cause was submitted to the jury under the instructions appearing on the record, resulting in a verdict of not guilty, on which judgment was entered.

The assignments of error question the correctness of the verdict, and the court's rulings on instructions.

The declaration in this case does not contain any allegation that the deceased was, at the time when he was injured, in the exercise of ordinary care, and we think that the jury were warranted in finding that the exercise of such care was not shown by the evidence.

The deceased was employed by the defendant to drive a mule drawing a small car in a tunnel being constructed under Lake Michigan. There was provided for the deceased a seat to be attached to the end board of the car; this seat the deceased neglected to use, and being seated upon the brick with which the car was laden, his head came in contact with a low place in the roof of the tunnel and he was killed. Had he used the seat he would not have been injured.

It is urged that the track upon which the car ran had been raised; that deceased did not know of this or of

the low place, and that in omitting to make use of the seat, and sitting upon the load of brick, he did only what the drivers had been for some time in the habit of doing.

We do not think this alters the case; the means of safety were provided for him, he knew of them and his administrator can not be heard to complain of an injury that would not have happened but for the negligence of his intestate.

If the low place in the roof of the tunnel or the raising of the track had been something that would, if unknown to the deceased, necessarily have caused injury to him, it would have been the duty of appellee to have warned him thereof; but neither such low place nor such raised track would have resulted in harm if the deceased had made use of the means provided for his safety. It appears that the deceased had, upon the morning of the accident, driven, unharmed, with his car, past the low place at least twice; his sitting upon the load of brick, instead of using the seat, which would have brought his head some twelve inches lower, was the cause of the injury he received.

It is indispensable in an action to recover damages, occasioned by the neglect of another, that the exercise of ordinary care by the injured party be shown. *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358.

The general finding of the jury being for the defendant, it must be presumed that its conclusion as to all disputed matters was such as would tend to sustain its finding upon the entire case. *Charles v. Remick*, 50 Ill. App. 534.

Counsel urge that there was no rule forbidding drivers sitting upon the top of their loads; we do not think that the defendant was obliged to make such a rule; it was enough for him that he provided the means of safety, and that there was no occasion for the neglect of the deceased to make use of such means. The low place in the roof did not increase the danger of the deceased's employment, if he made use of the seat provided for him.

We regard the instructions as fairly presenting the law applicable to the case, and that the jury were not, to the prejudice of the plaintiff, misled thereby.

The judgment of the Circuit Court is affirmed.

Willard v. Petitt.

S. A. Willard et al. v. Nina Petitt.

54 257
153 663

1. CONTINUANCE—*Insufficient Affidavit*.—It is not error to deny a motion for a continuance founded upon an affidavit which states mere conclusions, and not facts from which the court can determine whether the presence of an absent witness would be of benefit to the defendant.

Memorandum.—Action for malicious prosecution. Error to the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed March 26, 1894.

The opinion states the case.

L. M. SHREVE, attorney for plaintiff in error.

MASTERSON & HAFT, attorneys for defendants in error.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The plaintiff in error was a married woman at the time of the trial, and her husband and she were jointly sued in an action for a malicious prosecution. Before verdict the case was discontinued as to him. When the case was called for trial she moved for a continuance, because the state of his health prevented him from attending. The affidavits stated that she expected to prove by him "that the grievances complained of * * * were justifiable, and were committed, if at all, upon reasonable and justifiable grounds;" and that the attorney was "familiar with the proposed defense, * * * believes it to be a good and valid defense, * * * can not safely proceed to the trial of said cause" without the presence of the husband, who was seventy-five years old, and considerably infirm.

There was no error in denying the motion. All that the affidavits stated were mere conclusions, not facts, from which the court could determine whether his presence could be of benefit to the defendants. Schnell v. Rothbarth, 71 Ill. 83; Waarich v. Winter, 33 Ill. App. 36.

The instructions were not excepted to. We have, there-

fore, no question before us as to them. *Martin v. People*, 13 Ill. 341.

We can not go over the two hundred and sixty-two typewritten pages of evidence taken on the trial, to justify our conclusion that upon that evidence the question whether the plaintiff in error maliciously, and without probable cause, repeatedly prosecuted the defendant in error on a charge of larceny, was such a question as the verdict of a jury is final upon. The evidence is conflicting and irreconcilable. "The credibility of witnesses is for the jury." *Clevenger v. Curry*, 81 Ill. 432.

Whether anybody, and if anybody, who, told the truth upon the trial was for the jury to determine.

There is no error in the record, and the judgment is affirmed.

**Bradner Smith & Company, and National Bank of Illinois,
Impleaded, etc., v. Edna E. Mason.**

1. **PRACTICE—Void Rule to Answer.**—A rule to answer the petition made in the same order granting leave to file it, but directed to none of the parties to the suit, is void, and a default for want of answer to the petition is not warranted.

2. **SAME—Issues to be Determined upon Evidence.**—Where an answer denying all the material allegations is filed to a petition for an order, an issue of fact arises upon which the right to the order depends, and it is error to grant the order without hearing evidence.

Memorandum.—Creditor's bill. Appeal from the Circuit Court of Cook County: the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed March 26, 1894.

The opinion states the case.

WALKER & DAVIS, attorneys for appellants.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellant, Bradner Smith & Company, a corporation, filed a creditor's bill upon a judgment recovered against

Bradner Smith & Co. v. Mason.

one Joseph Stolba, and made the Germania Safe Deposit Company and the appellee, Edna E. Mason, co-defendants with said Stolba.

It was charged by the bill, that, among other things, Stolba had made a certain fraudulent conveyance of real estate to said Mrs. Mason, and that she had reconveyed the same to him by an unrecorded deed, and that he had rented a box in the Germania Safe Deposit Company's vaults, in which was deposited the deeds to said real estate, and certain money and valuable securities belonging to himself.

A receiver was appointed of all the property and effects of said Stolba, and he demanded of the Safe Deposit Company the contents of the said box contained in its vaults, which demand was refused by the Deposit Company, except upon the further order of the court.

Thereupon the court granted leave to Mrs. Mason to file an intervening petition in the cause.

The petition set up that the box in the deposit vaults was rented for the joint use of Stolba and herself, and that she had, subsequently to the renting of the box, used it jointly with Stolba as a place of deposit of money and valuable papers, and that there then remained in said box upward of one hundred dollars in money which belonged to her, and prayed for an order permitting petitioner to take from said box a sum of money not exceeding one hundred and three dollars and certain deeds of real estate.

The petition purports to be verified, but the verification was an insufficient one. The verification was, in substance, like that condemned in *Stirlen v. Neustedt*, 50 Ill. App. 378.

No point, however, is made on the sufficiency of the verification, and we only allude to it now that it may be cured as against future objection.

On September 5, 1893, there was a rule to answer the petition made in the same order granting leave to file it, but the rule was directed to none of the parties to the suit, and merely reads: "The court also hereby grants leave to said Edna E. Mason to file her intervening petition of this

date with rule to answer by September 11th, A. D. 1893." Such a rule required no one to answer the petition, and the default of the complainants on September 14, 1893, for want of answer to the petition, was not warranted, and seems to have been ignored.

The Safe Deposit Company did, however, file its answer to the petition, on September 11, 1893, and the complainants and the receiver demurred thereto on October 13, 1893.

The demurrer of the complainants was overruled on October 13th, and they were ordered to answer instanter, which they and the receiver did.

The answers so filed were verified, and denied in substance and in detail all the material allegations of Mrs. Mason's petition, and thereby an issue of fact arose upon which her right to the money depended.

With no evidence heard upon the issue so formed, the court, on mere motion, ordered the receiver to turn over to the solicitor, for Mrs. Mason, the deeds and one hundred dollars in money, found in the box in the Safe Deposit Company's vaults.

There was not a particle of evidence to warrant the order, and it must be reversed in accordance with the rule laid down in *Baird v. Powers*, 131 Ill. 66. Reversed and remanded.

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The Indiana, Illinois & Iowa Railroad Company v. Frederick O. Swannell, Frederick A. Swannell, Executors of the Last Will and Testament of William G. Swannell, Deceased, John C. Cushman, Joel D. Harvey, Samuel W. Strong, Patrick Dore and Henry M. Hooker.

1. *TRUSTEE - Duty of One Self-Constituted.* — A self-constituted trustee is bound to the observances of frankness, sincerity and good faith toward the principal whose affairs he volunteers to take in charge. He acquires no right of property by means of such interference, and is bound not only to the exercise of good faith, but of ordinary diligence.

I., I. & I. R. R. Co. v. Swannell.

2. *SAME—Cestui Que Trust as Owner of the Property.*—Courts treat the *cestui que trust* of property as its true owner; hence, it is as a rule necessary in a court of equity for those who claim to have purchased from a trustee, property which to their knowledge was held in trust, to show that the purchase money was applied to the use of the *cestui que trust*.

3. *VENDOR AND VENDEE—Purchaser of Property Can Not Shut His Eyes.*—A party in purchasing property can not shut his eyes to that which is easily to be seen if he will but look. He can not claim the benefit of ignorance when the opportunity for knowledge was before him.

Memorandum.—Bill to foreclose trust deed. Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1894, and reversed and remanded with directions. Opinion filed July 2, 1894.

The opinion states the case.

WALKER & EDDY, attorneys for the appellant, the Indiana, Illinois & Iowa Railroad Company.

THOMAS P. BONFIELD and GEORGE W. CASS, attorneys for appellees Frederick O. Swannell and Frederick A. Swannell.

THOMAS P. BONFIELD and G. FRANK WHITE, attorneys for appellees Samuel W. Strong and Henry M. Hooker.

DENT & WHITMAN, attorneys for appellee Patrick Dore.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The Kankakee & Pacific R. R. Co., being a corporation originally created by and under the laws of the State of Indiana, with power to locate and operate a road from Plymouth, in the State of Indiana, westerly to the boundary line of the State of Illinois, was consolidated with a company organized under the laws of the State of Illinois, the name of the consolidated company being the Plymouth, Kankakee & Pacific R. R. Co., with a capital stock of \$2,500,000. Said railroad company proceeded to procure a right of way, and partially completed its railroad, and made

large outlays of money for the purchase of material and payment of labor.

On the first day of June, 1871, the Plymouth, Kankakee & Pacific Railroad Company executed 3,600 bonds, each for the sum of \$1,000, due in thirty years, and to secure the same, executed a trust deed conveying all and singular its line of railroad and all its property in trust to J. Edgar Thomson and George W. Cass, of the State of Pennsylvania; 398 of said bonds were negotiated and sold to various parties.

Thereafter, default in the payment of interest having been made, Samuel T. Hanna and several other bondholders filed a bill on the 25th day of July, 1874, in the U. S. Circuit Court for the Northern District of Illinois, for the purpose of foreclosing the said trust deed.

On the 4th day of August, 1876, a decree was entered in said cause, which decree provided among other things that said railroad company should pay the amount found due on said bonds, and that in default of such payment the property described in the said trust deed should be sold by the master in chancery of said court, and the proceeds of such sale applied to the payment of the bonds and coupons described in said decree.

Thereupon the property covered by said trust deed was, in pursuance of such decree, on the 12th day of June, 1877, offered for sale by Henry W. Bishop, a master in chancery of said court. The report of the sale of the master, filed June 10, 1878, containing the following statement:

“At which sale Mr. John C. Cushman, trustee for bondholders, bid the sum of \$4,000, that sum being the highest sum bid for the same, and he being the highest bidder, and I further report that said bid has not yet been complied with, and respectfully ask of the court further directions herein.”

Prior to the property being offered for sale, a portion of the holders of said bonds had made an arrangement under which said John C. Cushman was to bid in the property for the use and benefit of such of the bondholders as might come in and become parties to such arrangement. Such

arrangement contemplated a reorganization, the issuance of new bonds to the old bondholders and the payment of a small sum upon each of the bonds to defray the necessary expenses attending upon such arrangement.

No further proceedings were had in said cause until February, 1881, at which time the said Cushman and one Joel D. Harvey filed in said United States Circuit Court their petition asking that said Cushman be allowed to complete his bid and receive a deed for said property, and on the 3d day of May, 1881, the said Circuit Court confirmed said sale to said Cushman and ordered the said master to execute and deliver a deed to him of said property, and a deed thereof was on the same day in pursuance of said order executed and delivered to said Cushman.

On the 11th day of July, 1881, said Cushman conveyed said property to appellant, the Indiana, Illinois & Iowa Railroad Company.

A few days prior to this conveyance Cushman made a deed to the trustees, respectively, of the Indiana, Illinois & Iowa Railroad Company, as he, Cushman, describes it, one set for the Indiana portion and one for the Illinois portion.

Cushman seems to have made two or three deeds for the benefit of this railroad. Each time that he so conveyed he took from Harvey, who had become the owner of the greater portion of the bonds for which the foreclosure was had, an indemnifying bond, which, among other things, provided that said Harvey should hold Cushman harmless against all loss, costs, damage and expenses to which said bondholders or any other person might seek to subject him, Cushman, by reason of such conveyance; and to pay all judgments, costs and expenses that might be awarded or rendered against him, Cushman, in any court of final or general jurisdiction in any suit or proceeding growing out of such conveyance, or of his trusteeship for the holder of any bond of the Plymouth, Kankakee & Pacific Railroad Company.

In consideration of the conveyance to the Indiana, Illinois & Iowa Railroad Company, Harvey received, according to his testimony, about \$150,000 of the stock of a company known as the Western Air Line Construction Company.

Under an order of reference made by the court in the case at bar, the master found that the new bonds which the respective bondholders were to receive by the terms of the reorganization contemplated by the arrangement under which said Cushman made his bid at the master's sale, would, if they had been issued, be worth thirty-three cents on the dollar, or, in other words, that if the plan of reorganization had been carried out the bondholders of the Plymouth, Kankakee & Pacific Railroad Company would have received for the bonds which they held, other bonds of the same amount and now actually worth thirty-three cents on the dollar.

The bill filed in the case at bar charges that subsequent to the entry of said decree in the U. S. Circuit Court, and before the confirmation of the sale, said Harvey purchased a large number of said bonds for a nominal sum, and that Cushman and Harvey conspired together to obtain the property, and to defraud Frederick O. Swannell, who filed the bill in the case at bar as a holder of some of the bonds secured by said trust deed, and also to defraud other holders of said bonds of their proportion in the said property mortgaged as aforesaid.

The bill charged that at the time Cushman conveyed the property as aforesaid, it was of sufficient value to pay the bonds of Swannell and the other bondholders in full, but that complainant never received anything from the proceeds of said sale. The suit at bar was brought by Swannell, on behalf of himself and other holders of the bonds similarly situated, who might desire to become parties and share the benefits of the suit. The prayer of the bill was that the title acquired by Cushman shall be declared to be in trust for all the bondholders, and that the conveyance from Cushman to the I., I. & I. Railroad Company shall be charged with the same trusts, and to be held in trust for Swannell and the said other bondholders, and that the said railroad company shall be decreed to deliver new bonds in equal amounts, according to the plan of reorganization. And the bill contained also, a prayer for general relief.

During the progress of the case at bar, various intervening petitions were filed. These, together with the original bill, were referred to a master, to take testimony and report. The master reported in favor of the bill filed by Frederick O. Swannell and Frederick A. Swannell, executors of the last will and testament of William G. Swannell, deceased, and a decree in their favor was entered.

In the matter of the intervening petition of Henry M. Hooker, it appears from the testimony taken by the master, that for the purpose of defraying the expense contemplated by the arrangement among certain bondholders, under which the said John C. Cushman made his bid at the master's sale, various assessments or calls were made upon the several bondholders, some of whom paid such calls and others did not; that among the bondholders at that time was the Third National Bank, of Chicago; that when the assessments and calls for contribution were made, said bank not having paid the same, received back its bonds from John C. Cushman, accompanied by a letter in which he stated that he considered himself absolved from any liability to said Third National Bank by virtue of said trusteeship, on the ground of the failure of said bank to make the contribution provided for, and also stating that he thereby surrendered all his authority to represent the said bonds held by said bank, and requested it to return to him his receipt, dated January 27, 1877, given for said bonds; that since said date no action has been taken thereunder by said Third National Bank, or by said Henry M. Hooker, whose petition is based upon his ownership of the bonds formerly held by said Third National Bank and surrendered to it by said Cushman as aforesaid. Nor did the evidence disclose that any offer had ever been made by said Third National Bank or said Hooker, to pay his share or portion in the expenses incurred in said foreclosure suit, of the amount of the purchase money paid by said trustee upon said sale. And the master, to whom the petition of said Hooker was referred, in his report against the allowance of the petition of said Hooker, includes as one of the reasons for disallowing his petition, that there is not

in it any offer made to contribute his share of expenses, but the only offer made by him is to pay his share and proportion of the amount of costs of the suit of Swannell against Cushman.

The intervening petition of Samuel Strong was also referred to the master, and testimony taken upon it. In such testimony it appears that in a letter dated November 23, 1880, said Strong wrote to said Cushman as follows:

"You will please deliver to L. G. Pearre, Esq., on presentation of this order, which shall be your receipt in full and a complete discharge from all liability, three first mortgage bonds of the Plymouth, Kankakee & Pacific Railroad Company, being numbers 426, 427 and 366, for \$1,000 each, and coupons thereto attached, together with the power of attorney authorizing you to act as trustee to represent said bonds." Also acknowledging receipt of \$12, amount of last assessment. And that thereupon said Cushman returned said bonds and receipt to said Strong.

In the matter of the intervening petition of Patrick Dore, upon reference to the master it appears in evidence that July 9, 1881, Mr. Dore gave to said Cushman the following release:

"CHICAGO, ILL., July 9, 1881.

I have this day received from John C. Cushman seven first mortgage bonds of the Plymouth, Kankakee & Pacific Railroad Company, numbered 440, 441, 443, 444, 445, 448 and 449, with interest coupons thereto attached, numbered from 6 to 60 inclusive. And I hereby release said Cushman from all further duty or liability in connection therewith, as my attorney or representative, and agree to hold him harmless therein, and waive all rights that I may have attained through or by him."

The master reported against the allowance of the relief respectively asked by Hooker, Strong and Dore. Upon exceptions filed, the report of the master in the case of Patrick Dore was overruled by the court.

The first decree of the court rendered upon the bill filed by the executors of Swannell was that the Indiana, Illinois

I., I. & I. R. R. Co. v. Swannell.

& Iowa Railroad Company should deliver to Swannell new bonds in accordance with the contemplated plan of reorganization under which Cushman bid, or in default thereof, should pay to said executors the value of said bonds in money. It afterward appearing that the said Indiana, Illinois & Iowa Railroad Company had failed to deliver to the executors of said Swannell the bonds as required by the former decree, the court ordered that the said railroad pay to the executors of Swannell, and the court also ordered that the said railroad pay to the said Dore the value of the bonds by the said executors and the said Dore respectively held, as found by the court, and that the petitions of Strong and Hooker be dismissed for the reasons set forth in the master's report.

As to the decree of the Circuit Court in this cause, the Indiana, Illinois & Iowa Railroad Company make no objections to the form of the proceedings had in the Circuit Court, or of a technical nature, but insist that upon the merits and in accordance with the case of *Cushman v. Bonfield*, reported in 139 Ill. 219, no decree whatever should have been rendered against it.

Messrs. Hooker and Strong insist that upon the merits the decree of the Circuit Court dismissing their petitions was wrong, and that they are entitled to relief of the same nature as that allowed to the executors of Swannell and to Patrick Dore.

As is said in the case of *Cushman et al. v. Bonfield*, 139 Ill. 219, "No question is or can be made, that, under the arrangement in pursuance of which Cushman became the purchaser at the foreclosure sale, of the property, rights and franchises of the Plymouth, Kankakee & Pacific Railroad Company, he became charged with the trust in favor of Bonfield, and the other bondholders who placed their bonds in his hands, and that he bid off said property, rights and franchises as their trustee. Nor would there seem to be any doubt that said trust relation continued up to the time the sale was confirmed and the master's deed executed to Cushman, or up to the time of the conveyances by which

said railroad property became vested in the Indiana, Illinois & Iowa Railroad Company."

It is equally clear that the master's report declaring as it did that the sale was to Mr. John C. Cushman, trustee for bondholders, the Indiana, Illinois & Iowa Railroad Company, taking title as it did from Cushman under such sale, is charged with notice of the trust, and it is immaterial whether the bondholders did or did not comply with the terms of the arrangement under which Cushman purchased as a trustee for them. As appears there was no sale of the property by the master, except to John C. Cushman in trust for bondholders.

If all or any of the bondholders failed to comply with the arrangement under which said Cushman so purchased in trust, the sale might have been set aside and a new sale ordered free from any trust; but Cushman having taken the title in trust could not, without the consent of those for whom he was a trustee, rid himself of the relation which he occupied to them. Moreover, the amount paid by said Cushman for the property, was most inadequate. So that the Indiana, Illinois & Iowa Railroad Company must from that circumstance, as well as the master's report, have known that the bondholders for whose benefit the foreclosure proceedings were had and the sale made, were entitled to the benefit of whatever Cushman, as such trustee, might obtain for the property.

The circumstances of the bid by sale and conveyance to Cushman were such that he thereby became a trustee for all the bondholders; as to those who came into the proposed arrangement he was by mutual arrangement a trustee, while as to those with whom no understanding was had, or an agreement made, he was a self-constituted trustee. A self-constituted trustee is bound to the observance of frankness, sincerity and good faith toward the principal whose affairs he volunteers to look after or takes in charge. He acquires no right of property by means of such interference, and is bound not only to the exercise of good faith, but of ordinary diligence. *Carey v. Carey*, 14 Ill. 112, 117.

Courts of equity treat the *cestuis que trust* of trust property as its true owners; hence it is, as a rule, necessary in a court of equity for those who claim to have purchased from a trustee, property which to their knowledge was held in trust, to show that the purchase money is applied to the use of the *cestuis que trust*. Perry on Trusts, Sec. 790; Hill on Trusts and Trustees, 509.

In the present case the purchase price not only was not applied to the use of the true owners of the trust property, but the sale by the trustee, being for stock of a construction company, was a mere attempted exchange of one kind of property for another.

A party in purchasing property can not shut his eyes to that which is easily to be seen if he will but look; he can not claim the benefit of ignorance when the opportunity for knowledge was before him. C., R. I. & P. R. R. Co. v. Kennedy, 70 Ill. 350.

The Indiana, Illinois & Iowa Railroad Company could, by the slightest examination, have ascertained in what way Cushman had purchased their property.

The arrangement under which Cushman made the bid of \$4,000 at the master's sale was an agreement entered into between him and one Oliver W. Barnes, of the city of New York, acting in behalf of the bondholders, and so is spoken of as the Barnes contract. In the case of Bonfield v. Cushman, 139 Ill. 219, in which case the rights of bondholders, growing out of said arrangement and purchase by Cushman, were under consideration, the Supreme Court, after setting forth how such an arrangement tended to prevent all competitive bidding at such sale, goes on to say:

“Cushman's purchase having been made under these circumstances, it seems too plain for argument that he held whatever rights he thus obtained in trust for all the bondholders, or, at least, in trust for those who accepted and became parties to the arrangement under which the sale took place. And it seems equally clear that the trust thus created was impressed upon and followed the title which was subsequently perfected in Cushman by the execution of the

master's deed in pursuance of said sale. The failure of the scheme embodied in the Barnes contract did not divest or extinguish said trust, as such failure in no way restored the bondholders to the position in which they stood before the sale. It gave them no opportunity or right to have the property re-sold, so as to have it bring its true value; but Cushman, on the contrary, persisted in adhering to his bid, and subsequently obtained a confirmation of the sale and a conveyance of the title."

The Supreme Court clearly indicated that, by the confirmation of the sale to Cushman and its conveyance to him, the property thus conveyed was thus impressed with a trust for the benefit of all the bondholders. Such seems to us to be the situation in which the property conveyed to the Indiana, Illinois & Iowa Railroad Company, stood upon the making of the conveyance to it by Cushman.

In this connection, the circular letter issued by Cushman after the making of his bid at said master's sale, is important as showing how the situation was presented to the various bondholders, and how they had a right to regard it. This letter is dated Chicago, March 27, 1878, and contains, among other things, the following:

"The sale was made on the 12th day of June, 1877, and the property, rights and franchises were bid in by me for the bondholders whom I represented, for the sum of \$4,000. The sale has never been confirmed, because the money was not in my hands to pay the costs and perfect it. Unless the sale is confirmed very soon, it will be set aside and a large additional expense thereby be thrown upon the bondholders."

At that time no sale had been made. The report of the master was not of a sale, but that, the property having been offered for sale, the highest bid he had received was the sum of \$4,000, offered by Cushman, as trustee for bondholders. This bid had been made in pursuance of an agreement made by Cushman with Barnes, acting in behalf of all the bondholders, that the property should be bid off for the use and benefit of all the bondholders; and this circular

letter by Cushman informed the bondholders that the sale had not been confirmed, and that, unless confirmed very soon, it would be set aside. More than three years elapsed without it having been confirmed; each and all of the bondholders had, therefore, a right to believe that the sale would either not be confirmed, or, if confirmed, the confirmation would be for the benefit of each and all of them.

We are therefore of the opinion that, under the arrangement made by Cushman with Barnes for all of the bondholders, the bid made by him and the report thereof made by the master, and the confirmation of the sale and the deed years after such sale; the property conveyed to Cushman was received by him in trust for all the bondholders, and that the mere fact that some of the petitioners to this proceeding received back from Cushman, bonds which they had delivered to him, and that he returned to them money they had paid in, and received from them receipts releasing him from any obligations to them, was not sufficient to discharge the property from the trust imposed upon it by the foreclosure proceedings and the sale had thereunder, and that the Indiana, Illinois & Iowa Railroad Company having received such property with notice of the trust, must respond to petitioners for the value of their liens upon it, the rights of Dore, Hooker and Strong, respectively, as set forth in their respective petition, being based, as we think they are, not so much upon the fact of their having paid assessments or calls had under the contemplated plan of reorganization, as upon the nature of the circumstances under which the sale and conveyance was made to Cushman. We regard the case made by Dore and Strong, respectively, as similar to the case made by the executors of Swannell, that the court could properly consider and dispose of them in one proceeding. Story's Eq. Pleading, Secs. 97, 111, 126, 129, 129a, 271; Pomeroy's Eq. Juris., Secs. 115-269; Henderson v. Cummings, 44 Ill. 325.

The decree of the Circuit Court is therefore reversed, with directions to enter a decree in favor of Samuel W. Strong, against the Indiana, Illinois & Iowa Railroad Company for

thirty-three cents on the dollar of the par value of three bonds of \$1,000 each, less the sum of \$12, being for the sum of \$978, with interest thereon at five per cent per annum from the 21st day of October, 1891; and to enter a decree in favor of Henry M. Hooker against the Indiana, Illinois & Iowa Railroad Company for thirty-three cents on the dollar of the par value of twenty-five bonds of \$1,000 each, less the sum of \$225, with interest at five per cent per annum, being for the sum of \$8,025, with interest thereon at five per cent per annum, from the 21st day of October, 1891.

And the decrees, respectively, in favor of the executors of Swannell and that in favor of Patrick Dore, are reversed, with directions to render decrees in favor of said executors and said Dore, respectively, for the principal amount severally found for said executors, and for the amount severally found for said Dore, with interest thereon in each case at the rate of five per cent per annum from the 21st day of October, 1891, instead of the rate of six per cent per annum, as directed by the decree of the Circuit Court. Reversed and remanded with directions.

The clerk of the court will tax against the Indiana, Illinois & Iowa Railroad Company one-half of the costs of these appeals, and will tax against the executors of Swannell and against Patrick Dore the other half of the costs of these appeals; as between the executors of Swannell and said Dore, the clerk will tax against each, such proportion of one-half of the entire costs as the amount of their respective interests bear to each other, viz., against said executors five nineteenths of said half and against said Dore fourteen nineteenths of said half.

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Pittsburg, Cincinnati, Chicago & St. Louis R. R. Co.
v. West Chicago St. R. R. Co.
and
Chicago, Burlington & Quincy R. R. Co. v. West Chi-
cago St. R. R. Co.

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1. EMINENT DOMAIN—*Where Condemnation Proceedings Do Not Lie.*
—Condemnation proceedings do not lie for mere damage, if no property is taken.

Memorandum.—Bill for injunction. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed March 6, 1894.

LOESCH BROTHERS, attorneys for appellants.

E. JAMISON and GEORGE HUNT, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

These two cases are alike with one exception to be noted. Both are bills filed by the appellants to enjoin the appellee from extending the tracks of the street railway across the tracks of the appellants at street crossings, and the only question is whether the appellee should first proceed to condemn, under the eminent domain act.

In the first case, the fee at the crossing is in the city; in the second, in the appellant, subject to the public easement as a street. We are of opinion that this difference of fact makes no difference in principle, and that the Circuit Court rightly dismissed both bills for want of equity.

It is enough for us to refer to sections 722–723, of Dillon's Municipal Corporations for the reasons. Condemnation proceedings do not lie for mere damage, if no property is taken. *Stetson v. Chicago & Eastern Illinois R. R. Co.*, 75 Ill. 74. Affirmed.

**Alexander McIntosh v. Francis A. Barnes and Samuel
M. Parish, co-partners doing business as
Barnes & Parish.**

1. **EXCEPTIONS**—*Not the Duty of the Clerk to Keep, etc.*—It is not the duty of the clerk of the trial court to keep note of exceptions taken, and his minute of the same does not make them a part of the record.

Memorandum—Assumpsit. Appeal from the Circuit Court of Cook County; the Hon. SAMUEL P. McCONNELL, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 19, 1894.

JOHN T. RICHARDS, attorney for appellant.

EDWARD L. BARBER, attorney for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This suit was brought by appellees, who are real estate brokers, against appellant, to recover commissions claimed to have been earned by them in the sale of certain premises in the city of Chicago. There was a finding and judgment for the plaintiff.

In the record here presented, no exception to anything done by the court below appears, save an exception taken to the overruling of a motion for a new trial, but neither such motion nor exception is shown by the bill of exceptions. It is not the business of the clerk to keep note of exceptions taken, and his minute of the same does not make them a part of the record. *Foreman v. Johnson*, 37 Ill. App. 452; *Underhill v. M. & C. R. R. Co.*, 40 Ill. App. 22; *Harris v. The People*, 130 Ill. 464; *Burnett v. Snapp*, 39 Ill. App. 237.

We therefore can not consider the motion for a new trial or the reasons urged in support thereof.

The judgment of the Circuit Court is affirmed.

Booth v. Gaither.

Ballington Booth v. Charles A. Gaither.

Charles C. Lamos v. B. D. Marks.

1. **RECORD—*Stipulation as to Bill of Exceptions.***—A stipulation that the bill of exception smay be made a part of the record accomplishes nothing; the bill of exceptions is a part of the record without a stipulation.

Memorandum.—Appeals from the Superior and Circuit Courts of Cook County. Heard in this court at the March term, 1894, and affirmed. Opinion filed July 2, 1894.

CHARLES E. POPE, attorney for Ballington Booth.

THORNTON & CHANCELLOR, attorneys for Charles A. Gaither.

DAHMS, LANGWORTHY & POPPENHUSEN, attorneys for Charles C. Lamos.

WM. C. HOYER and CHAS. E. REEVE, attorneys for B. D. Marks.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The errors said to exist in the record of each of these cases are alleged to arise out of the evidence adduced upon the trial.

In each, the original instead of a copy of the bill of exceptions is certified here under a stipulation, which is that the bill of exceptions may be made a part of the record. Such a stipulation accomplishes nothing. The bill of exceptions is a part of the record without stipulation.

We have so often called attention to the statute under which the original of a bill of exceptions may be inserted in the transcript of the record instead of a copy, that further reference thereto seems useless. The respective judgments are affirmed.

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Chicago & Grand Trunk Railway Company v. Joseph Gaeinowski, Administrator of the Estate of Andreas Gaeinowski, Deceased.

1. **WAIVER—*Abandoned Issues.***--Where the court, over objections, permits the introduction in evidence of matters foreign to the issue and then strikes the same out, and later on in the trial the other party introduces evidence of the same matter, *it is held* following up an abandoned issue, and is to be regarded as a waiver of the objections.

2. **MEASURE OF PROOF—*Requisites of a Recovery.***—In an action for damages resulting from a death caused by negligence, the declaration alleged as next of kin of the deceased, the father, mother, two brothers and five sisters. Only the father and mother were proved. *Held*, sufficient to sustain a recovery. It is only necessary to prove a part of the declaration, if that part makes a case.

Memorandum.—Action for damages. Death from negligent act. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed June 4, 1894.

The opinion states the case.

SAMUEL B. FOSTER, attorney for appellant.

CHAS. E. REEVE, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee is the administrator of his son, who was killed at the age of nine years and five months, by a locomotive of the appellant, at a grade crossing of the railroad and Loomis street, near Forty-ninth street, in the city of Chicago, on the twenty-fifth day of March, 1891.

There was such evidence as justified the jury in finding that as a long freight train was crossing Loomis street westward, a locomotive met it upon the crossing backing eastward; that the gates were not down; that the track upon which the train was, was north of the track upon which the locomotive was, and the boy, from the south side of the railroad, was going north on Loomis street upon an errand for his mother; that with no notice that the locomotive was ap-

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proaching, he went toward the freight train to cross the railroad tracks as soon as the freight train should be out of his way, and in so doing was caught by the locomotive and killed. The only dispute as to any of these circumstances is whether the gates were down, and the verdict of the jury is final on that.

The court permitted, over the objection and exception of appellant, testimony that the flagman was often drunk, after it was testified that he was drunk at the time of the accident. If this was error, we think it was cured.

Later the court struck out the testimony, and later still, the appellant put in considerable testimony that the flagman was a sober, industrious man. This conduct of the appellant, in following up an abandoned issue, should be regarded as a waiver of the point, if the original introduction was wrong, which we need not decide.

The declaration alleged as next of kin of the deceased the father, mother, two brothers and five sisters. Only the father and mother were proved, though both of them were witnesses. But if they had been the only next of kin, the cause of action would have been the same. It is only necessary to prove part of the declaration, if that part makes a case. *Chi., R. I. & P. R. R. v. Clough*, 134 Ill. 586; *L. S. & M. S. R. R. v. Hundt*, 41 Ill. App. 220.

It is not to be assumed that the jury considered loss sustained by any next of kin not proved to exist, and the amount of damages as assessed by the jury can not be questioned. *Bradley v. Sattler*, No. 5144. March term, 1894. *Post*.

All the law contained in the fifth instruction, refused, was in the second given. The judgment is affirmed.

Hibernian Banking Association v. Commercial National Bank.

1. **FREEHOLD**—*Where Involved*.—A freehold is involved where the title is so put in issue by the pleadings that the decision of the case necessarily involves a decision of such issue, although the judgment or

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decree does not result in one party gaining and the other losing the estate.

Memorandum.—Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1894, and appeal dismissed. Opinion filed July 2, 1894.

WILSON, MOORE & McILVAINE, counsel for appellant.

JOSEPH A. SLEEPER, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The bill in this cause was filed by the appellee, who alleged itself to be the owner in fee simple, absolute, of the real estate involved, under and by virtue of certain proceedings and conveyances set forth.

The prayer of the bill, among other things, was that the complainant might be decreed to be the owner in fee simple, absolute, of the premises; that a certain deed made by Caulfield, a former owner, to the appellant, although absolute on its face, might be declared to be a mortgage, and, as such, barred by the statute of limitations, and that it be cleared off and removed, as a cloud upon appellee's title, and that appellee might be decreed to be the owner of said premises free and clear from the said cloud.

By its answer the appellant denied that the appellee was the owner in fee simple, absolute, of the premises; admitted that the execution sale under a judgment against Caulfield, the former owner, which was one of the sources of appellee's title, took place, and that no redemption was made therefrom, but denied that any title vested in appellee thereby; admitted the conveyance to the appellee by the deed from Caulfield, the former owner, and the taking possession by appellee thereunder, but denied that such possession was taken in good faith, and on the contrary averred that appellee always had known that its only claim to said premises was a lien on such interests it could acquire by such conveyance; admitted a conveyance by a master in chancery to the appellee, under a sale made in pursuance of a decree

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in the Warder suit, which was alleged by appellee as another source of its title, but averred matters in denial of the effectiveness of any title acquired under that conveyance.

We have, as we think, stated from the bill and answer all that is necessary to show that the question of freehold is clearly involved, and that the point raised by the appellee that this court is without jurisdiction, is well taken.

A freehold is involved where the title "is so put in issue by the pleadings that the decision of the case necessarily involves a decision of such issue, although the judgment or decree does not result in one party gaining and the other losing the estate." *Sanford v. Kane*, 127 Ill. 591; *Malaer v. Hodgins*, 130 Ill. 235; *Village of Riverside v. Watson*, 54 Ill. App. 432.

Here the appellant does not, it is true, claim the freehold itself, but it denies the title of the appellee, upon which the right to any relief by the appellee depends; and in that respect it is, in principle, exactly like cases where the plea of *liberum tenementum* is directly put in issue by a replication, and involves a freehold. *Piper v. Connelly*, 108 Ill. 646; *Town of Brushy Mound v. McClintock*, 146 Ill. 643; *Sanford v. Kane*, *supra*; *West Chicago Street R. R. Co. et al. v. Morrison, Adams & Allen Co.*, 54 Ill. App. 556; *Pratt v. Kendig*, 30 Ill. App. 281.

The appeal will therefore be dismissed.

John Gustave Eggers v. Albert Busch.

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1. REAL ESTATE—*Contracts for the Sale of*.—Where parties enter into a written contract, the one to convey the land to the other in fee simple, clear of all incumbrances whatever, by a good and sufficient warranty deed, the purchaser is entitled to a merchantable title.

2. SAME—*Merchantable Title Defined*.—A merchantable title is one not subject to such a reasonable doubt as would create a just apprehension of its validity in the mind of a reasonable, prudent and intelligent person; a title that such a person, guided by competent legal advice, would be willing to take and pay the fair value of the land for.

3. SAME—“*Material Defects*” in Titles.—A material defect in the title of land, is such a defect as will cause a reasonable doubt and just apprehension in the mind of a reasonably prudent and intelligent person, acting upon competent legal advice, and prompt him to refuse to take the land at a fair value.

4. RESCISSION OF CONTRACT—*Failure of Title*.—Where two persons enter into a contract for the sale and purchase of land, the vendor, for a specific consideration, to convey by a warranty deed the land mentioned in the contract, clear of all incumbrances, and he submits an abstract of title, an examination of which discloses material defects in the title, if the vendor is notified thereof, and within a reasonable time thereafter fails to remedy such defects, the purchaser has a right to rescind the contract and recover the money paid under the contract.

5. VENDOR AND VENDEE—*Defective Titles*.—It is a familiar rule that the vendor can not force the purchaser to pay his money and receive a defective title.

6. SAME—*Vendor's Readiness to Perform*.—Although a vendor may not be required at all times from the entering into of a contract, to be in a situation to perform on his part, he must be so when he demands performance by the vendee.

Memorandum.—Assumpsit for money had and received. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed July 2, 1894.

FRANK J. CRAWFORD, attorney for appellant.

KRAFT, WILLIAMS & KRAFT, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

A suit in assumpsit was brought by the appellee to recover back from the appellant \$1,200, which had been paid under a contract between the parties for the purchase and sale of a certain tract of land situated in Indiana, for the price of \$6,000.

The contract provided for the conveyance of the land to the appellee “in fee simple, clear of all incumbrances whatever, by a good and sufficient warranty deed.”

The \$1,200 was paid, as was provided by the contract, upon the delivery of the contract, and the remaining \$4,800 was to be secured by trust deed on the premises, and payable at a future date.

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To satisfy the appellee that the title was good and clear in appellant, the latter, as a matter of fact, furnished to the appellee an abstract of title to the land, although the contract did not require that an abstract of title should be furnished.

The attorney to whom the abstract was delivered for examination, found what appears to have been substantial objections to the title. It appears that the appellant had, about the same time, undertaken to sell other similarly situated land to another party, whose attorneys interposed like objections to the title, and that appellant filed a bill in the Indiana courts to cure the defects and quiet his title to both tracts. That bill was filed before the attorney for appellee had given his opinion upon the title, but after the contract was entered into, and no decree was obtained thereunder until after this suit was begun.

The contract was made April 6, 1891; the opinion of title, by appellee's attorney, was given June 24, 1891; the Indiana suit to quiet title was begun June 23, 1891, and the decree thereunder entered September 17, 1891, and this suit was begun July 9, 1891.

It is not necessary to detail the various negotiations, demands and counter-demands between the parties. The question is, whether, under the contract, the appellee was bound to take the land and perform his part of the contract with the title in the condition that it was, and, if not, may he maintain an action to recover back what he paid down at the time the contract was delivered.

The learned judge of the Circuit Court, before whom the cause was tried, without a jury, held the following propositions of law, submitted by the appellee (plaintiff):

“First. Where two parties enter into a contract in writing, the one to convey to the other real estate for a consideration, and the contract provided that the proposed purchaser shall first make the payments and perform the covenants in the contract mentioned by him to be performed, and the proposed seller covenants and agrees to convey and assure to the proposed purchaser a title in fee simple, clear of all

incumbrances whatsoever, by a good and sufficient warranty deed, to the land named in said contract, and there remains nothing to be done on the part of the proposed purchaser except payment of the last sum mentioned in the agreement, or the performance of the last thing to be done by the proposed purchaser and the delivery of the deed on the part of the proposed seller, then the payment of such last sum, or the performance of such last thing by the proposed purchaser, and the delivery by the proposed seller of the warranty deed conveying title in fee simple, free of all incumbrances, according to the contract, become mutual, dependent and simultaneous acts, to be performed by the respective parties at one and the same time.

Second. Where parties enter into a written contract, the one to convey the land to the other in fee simple, clear of all incumbrances whatever, by a good and sufficient warranty deed, the proposed purchaser is entitled, under the terms of such contract, to a merchantable title; that is, a title not subject to such reasonable doubt as would create a just apprehension of its validity in the mind of a reasonable, prudent and intelligent person; one that persons of reasonable prudence and intelligence, guided by competent legal advice, would be willing to take and pay the fair value of the land for.

If, in this case, the plaintiff and defendant entered into such contract, but, at the time of the tender of such deed by the defendant to the plaintiff, the title to the land in question was not a merchantable title, but was such a title as would occasion reasonable doubt of its validity in the minds of persons reasonably prudent and intelligent, so that such persons would be unwilling to take the land and pay the fair value therefor, and if, within a reasonable time after notice thereof to the defendant, he, the seller, failed, or refused to make the title merchantable, then the plaintiff had a right to rescind the contract.

Third. A material defect in the title to land is such a defect as will cause a reasonable doubt and just apprehension in the mind of a reasonably prudent and intelligent

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person acting upon competent legal advice, and prompt him to refuse to take the land at a fair value.

Fourth. Where two persons enter into a contract in writing for the sale and purchase of land, the one for a specified consideration to convey to the other, by a good and sufficient warranty deed, the land in said contract mentioned, in fee simple, clear of all incumbrances whatsoever, and submits to the proposed purchaser for examination an abstract of title to the land, as containing a correct history and source of the title the seller proposed to convey, and an examination of said abstract discloses material defects in the title to said land, and the proposed seller is notified thereof, and within a reasonable time thereafter refuses or fails to remove or cure such material defects in the title as are shown by said abstract, then the proposed purchaser has a right to rescind the contract and recover from the proposed seller any amount he may have paid under the contract."

Those propositions we regard as admirably adapted to the fact as disclosed by the record.

The title disclosed will bear no such test as that indicated in the second proposition. *Cravener v. Hale*, 27 Ill. App. 275; *Hale v. Cravener*, 128 Ill. 408.

Although the contract did not prescribe a particular time within which the deed should be delivered and the trust deed and note given back, the law will presume it was to be done within a reasonable time. And the appellant placed his own construction upon the contract in that regard, when, in July, about three months after the date of the contract, he tendered a deed to appellee, and demanded that he execute a note and trust deed, then presented to appellee for execution.

Appellant could not thereafter complain that appellee elected to treat the contract as then at an end, and brought suit to recover back the money he had paid.

At that time the title was, most clearly, not such as appellant had contracted to convey.

"It is a familiar rule that the vendor can not force the purchaser to pay his money and receive a defective title." *Lancaster v. Roberts*, 144 Ill. 213.

We do not regard it as important to consider the effect upon the title of appellant, of the Indiana decree that was entered upon the bill to quiet title, after this suit was begun.

It is enough that we consider that the right of appellee to rescind the contract, and bring suit to recover back the money he had paid, was established from the time that appellant tendered the deed and demanded performance of the contract by appellee—appellant's title at that time being such as appellee was entirely justified in refusing to accept.

The appellant was, at that time, incapable of performing the contract on his part, and by his tender and demand under such conditions he placed the appellee in a position where he might rescind and bring suit for his money.

Although a vendor may not be required at all times from the entering into of a contract to be in a situation to perform on his part, he must be so when he demands performance by the vendee. See authorities cited in *Eames v. Der Germania Turn Verein*, 8 Ill. App. 663.

The judgment of the Circuit Court was correct and will be affirmed.

William Barger, by Next Friend, v. North Chicago Street R. R. Co.

1. PLEADING—*To be Taken Most Strongly Against the Pleader.*—A pleading is to be taken most strongly against the pleader. So where the allegation showed that the plaintiff was on a car, ready to pay fare, it *was held* sufficient to show that he was a passenger, and as such, lawfully upon the car; but without an allegation charging the defendant as a common carrier of the plaintiff as a passenger, he was not entitled to claim that redress which he could only have where such relation existed.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed June 18, 1894.

A. B. ST. JOHN, attorney for appellant; ALLAN C. STORY and FRED. W. STORY, of counsel.

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EDMUND FURTHMANN, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an action for personal injury. The appellant (plaintiff) testified that he got upon the front platform of a horse-car of the appellee (defendant), by invitation of the driver, and by his direction stood on the driver's right hand. That he, the plaintiff, had a nickel in his pocket, but the conductor did not come or ask for fare; that the driver struck him, the plaintiff, knocking him off the car, and the wheels ran over his leg, injuring it so that it was amputated. As to being pushed from the car, he was corroborated by two other witnesses.

No count of the declaration alleges in terms that the plaintiff was a passenger, though two of them allege that he was lawfully upon the car, and was pushed from it by the driver. Consistently with the declaration he may have been the car-driver's own son, bringing a lunch.

Showing that the plaintiff was on the car, ready to pay fare (the truth of that showing being a question for the jury), is a showing that he was a passenger, and as such, lawfully upon the car; but without a count charging the defendant as a common carrier of the plaintiff as a passenger, the plaintiff was not entitled to claim redress which he could only have if such relation existed.

Now, the responsibility of a passenger carrier for the conduct of its servants toward other persons upon the car, exists only when such others are passengers, or when its servants are discharging some duty they owe to their master.

For a willful trespass by the servant the carrier is responsible if the person injured was a passenger. *Chicago & E. I. v. Flexman*, 103 Ill. 546; S. C., 9 Ill. App. 250. No authority goes beyond that.

The cases most nearly like this are *Chicago, M. & St. P. v. West*, 125 Ill. 321, and *North Chicago City Ry. Co. v. Gastka*, 128 Ill. 613. In those cases, however, the ground of the decisions is that the acts of the servants from which the injuries resulted were performed within the general scope of their employment, etc. Here there is neither allegation

in the pleadings, nor suggestions in the evidence, that the driver was performing any duty he owed to the appellee. The appellant raises some apparently unimportant questions about evidence, but as, with one trivial exception, no reference is made in the brief to where, in thirty pages of abstract and two hundred of record, the matter can be found, we have not searched for it.

Complaint is made of the refusal of some, and modification of other, instructions asked by the plaintiff; but the abstract shows that the court gave three instructions on that side which are not set out in the abstract, and all the law he was entitled to may have been in them. Said the Supreme Court in *Chapman v. Chapman*, 129 Ill. 386, "The series of instructions given does not appear in the abstract, nor is it shown, in any manner, that the jury was not properly instructed on behalf of appellant, nor that the refused instructions were not, in effect, given in others * * * we might with propriety refuse to consider the point."

The difficulty with this case is that, though the plaintiff put in testimony, which, if true, entitled him to recover for an injury to him as a passenger, his declaration does not claim that he was a passenger, nor in any way set out a state of facts that would make the appellee responsible for the alleged acts of the car driver. It does not state a cause of action. Judgment upon it would be reversed, if the insufficiency of the declaration were assigned as error. *Chi., Mil. & St. P. v. Hoyt*, 50 Ill. App. 583. We can not for errors, if any there be, reverse a judgment for the defendant in a case where, upon the record, the plaintiff could have no right to a judgment. *Theodorson v. Ahlgren*, 37 Ill. App. 140; *Davis v. Johnson*, 41 Ill. App. 22; *Carey-Lombard Co. v. Hunt*, 54 Ill. App. 314. The judgment is affirmed.

MR. JUSTICE GARY ON REHEARING.

The abstract shows that on the trial below the appellee put in evidence some rules of the appellee relating to the conduct of car drivers, and that the appellant excepted to the admission of those rules in evidence.

Luetgert v. Volker.

It does not appear that in the court below any further notice was taken of those rules, nor were they alluded to in the opening brief of the appellant. In the reply brief there is an allusion to rules in evidence, not stating what they were, or where they might be found, unless such parentheses as these (10-11)—(38-233), without more, are guides.

A rehearing could not be granted even if those rules affected the questions which we had to decide. *People v. Hanson*, 37 N. E. R. 580, is express.

The appellant must abide by the case made in the opening brief, say the Supreme Court.

Rehearing denied.

Albert Luetgert v. Frederick W. Volker.

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1. **SALES—Without Warranty or Fraud.**—Where the vendor of merchandise takes the same upon his own judgment he must pay the agreed price.

Memorandum.—Assumpsit for goods sold, etc. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed June 18, 1894.

ARNOLD TRIPP, attorney for appellant.

S. P. DOUTHART, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee sued the appellant for the price of 28,564 pounds of sausages at thirteen cents per pound, sold and delivered to the appellant by the appellee, about July 1, 1889, to be paid for in twenty days from delivery.

The defense was bad quality of the sausages, that the sale was by sample, etc. The jury found specially that the sale was not by sample, and by that finding in effect found, when the evidence in the case is considered, that the sale

was without warranty or fraud. This finding was amply justified by the evidence.

The appellant went through the stock and examined it as much as he chose to do.

The criticisms of the appellant on the various steps of the trial are therefore unimportant, as the appellant took the sausages upon his own judgment and must pay the agreed price. *Tilley v. Enterprise Stone Co.*, 127 Ill. 457; *Becker v. Brawner*, 18 Ill. App. 39.

The contract was in writing and interest was promptly allowed. *Morris v. Wibaux*, 47 Ill. App. 630, where the cases are collected.

The judgment is affirmed.

The Eugene Glass Co. v. A. Vere Martin.

1. INSTRUCTIONS—*Should Omit Nothing Material.*—An instruction which assumes to embrace every element essential to a recovery, should omit nothing material.

2. SAME—*Should Not Be Misleading.*—An instruction which tells the jury that the defendant must prove his set-off by a preponderance of evidence, and if he has failed "then the jury have a right to disregard the same and find for the plaintiff the amount, if any, shown to be due him," etc., is misleading, as it might be understood by the jury that the plaintiff was entitled to recover because the defendant failed to prove his set-off by a preponderance of the evidence.

Memorandum.—Assumpsit for services. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed June 18, 1894.

The opinion of the court states the case.

WOOLFOLK & BROWNING, attorneys for appellant.

MANN, HAYES & MILLER, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

A. Vere Martin about March 1, 1892, made a verbal con-

Eugene Glass Co. v. Martin.

tract with the Eugene Glass Company, to go on the road for a year selling its glass. Martin was to travel nine months of the year and receive therefor a commission of fifteen per cent on all the sales made by the company within certain States.

Out of these commissions, Martin was to pay his traveling expenses.

It was insisted by the defendant that the plaintiff refused and failed to travel as he had promised.

The jury returned a verdict of over \$1,500 for plaintiff, upon which there was judgment, and from which the defendant prosecutes this appeal.

As this case must be reversed and remanded, we refrain from commenting upon the evidence, other than to say that we think that the plaintiff failed to show that he had complied with his contract.

At the instance of the plaintiff the court gave the jury the following instructions :

“1. The court instructs the jury that if they believe from the evidence in this case that the plaintiff, Martin, agreed with the defendant, as alleged in the declaration, to travel as its salesman, and that the defendant by its officers agreed to pay plaintiff for such services a commission of fifteen per cent on all orders within the territory mentioned in the declaration, and if the jury further find from the evidence that the said Martin performed his part of the agreement and that there is a balance due said Martin from the defendant for commissions, then the jury shall find for the plaintiff the amount due, as shown by the evidence.

“3. The court instructs the jury, as a matter of law, that where the defendant files a notice of set-off, it must prove its claim by a preponderance of evidence, and unless the jury believe that the defendant in this case has proved its claim of set-off by a greater weight of all the evidence, then the jury have a right to disregard the same and find for the plaintiff the amount, if any, shown to be due him under the agreement for commissions, as appears from evidence in this case.”

The allegation in the declaration is only inferentially of any agreement upon the part of the plaintiff. It is substantially that in consideration that the plaintiff at the defendant's request would travel nine months between the first day of March, 1892, and the 28th day of February, 1893, soliciting orders for and selling stained glass for the defendant, and paying his own necessary traveling expenses, the defendant would pay to the plaintiff fifteen per cent of the amount of certain orders by it received.

The first instruction authorizes a recovery if the jury believe the plaintiff performed his agreement to travel as the defendant's salesman. The plaintiff undertook in his declaration to set forth the consideration for the defendant's promise. The first question for the jury was whether there had been a failure of consideration—that is, did the plaintiff travel and solicit as it was understood he should. If a reference was to be made in an instruction to the declaration it should have been made in such manner that the consideration for the defendant's promise stated in the declaration would have been clearly understood by the jury. The instruction left the jury to infer that if the plaintiff merely agreed to travel as the defendant's salesman, and did so travel, he was entitled to recover.


The second instruction above noted very likely would be understood by the jury that the plaintiff was entitled to recover if the defendant failed to prove its set-off by a preponderance of all the evidence. Such an instruction should not have been given.

The judgment of the Circuit Court is reversed and the cause remanded.

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Louis Daube v. Walter Tennison, by Next Friend.

1. APPELLATE COURT PRACTICE—*Bill of Exceptions—Transcript of the Record.*—Where the original bill of exceptions is brought to the Appellate Court under a stipulation that it may be inserted in the record, instead of in the transcript of the record as the statute requires, the court will not review matters appearing in it.



Evans v. Marden.

Memorandum.—Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed July 2, 1894.

B. M. SHAFFNER, attorney for appellant.

E. W. ADKINSON, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

We are urged to set aside the judgment entered in this case, because, as is insisted, the verdict of the jury is against the evidence. A verdict for the defendant might have properly been rendered.

Two juries have found for the plaintiff, and it is likely a third would do the same.

We can not say that there was in this case any such preponderance of evidence against the conclusion arrived at by the jury that the defendant is entitled to a new trial.

The trial judge required that from the verdict a remittitur of \$500 be made. The judgment has, after this evidence of careful consideration, been approved by him.

Another reason for affirming the judgment in this case, is that the original bill of exceptions is brought here under a stipulation that it may be inserted in the record, not, as the statute provides, may be inserted in the transcript of the record.

The judgment will therefore be affirmed.

Fred T. Evans v. Orson S. Marden.

1. CONTINUANCES—*Statements in Affidavits.*—A statement in an affidavit for a continuance, that it is expected to prove by the absent witness what some one ought to have known about the transaction involved, is not a sufficient statement of particular facts required by the statute, and variant from the established law of evidence.

2. SAME—*Allegations of the Affidavit Taken Most Strongly Against the Mover.*—As in the case of a pleading, all intendments must be taken against an affidavit for a continuance; and for the purpose of passing

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upon its sufficiency it can not be assumed that the witness will testify to anything more than the affidavit states in its least favorable view to the party making it.

3. **SHORT CAUSE CALENDAR**—*Discretion as to Cases Taking More Than an Hour.*—The statute concerning the short cause calendar makes it discretionary with the trial court to stop the trial at the expiration of one hour, or to proceed with the trial to final judgment. It must be an extreme case when a court of review will interfere with the discretion of the trial court in such a matter.

Memorandum.—Assumpsit for services. Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed July 2, 1894.

HENRY W. MAGEE, attorney for appellant.

WEIGLEY, BULKLEY & GRAY, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

Marden, the appellee, brought his suit in assumpsit against the appellant and the South Dakota Hot Springs Company for services as manager of the "Hotel Evans" at Hot Springs, South Dakota. Evans, the appellant, was president of the hotel company, and seems to have controlled the corporation.

Whatever the contract may have been, it was made between Evans, acting either for himself or the corporation, and Marden. At first the arrangement seems to have been that Marden should operate the hotel as proprietor, but the final arrangement was that he should act as manager merely.

The suit was to recover what his services were reasonably worth.

At the close of the evidence the appellee dismissed the cause as to the hotel company, leaving the appellant the sole defendant, and a verdict was rendered against him alone.

When the cause was dismissed as to the hotel company, the appellant interposed a motion for a continuance of the cause on the ground of surprise by the amendment, which motion was overruled, and the court proceeded to instruct the jury.

Evans v. Marden.

In support of his motion for a continuance the appellant's counsel presented his affidavit for a continuance, under Section 26 of the Practice Act, relating to continuances after amendments.

The material part of that affidavit is that the affiant, as attorney for appellant, had tried the cause "upon the belief that no valid judgment could be obtained against the said Fred T. Evans and the said South Dakota Hot Springs Company jointly, by reason of the statements to affiant that there was no joint liability whatsoever, but that the liability, if any, in this cause, was on the part of the said South Dakota Hot Springs Company," and that in consequence of said amendment "he is unprepared to proceed to or with the trial of the cause at this term of court, by reason of his inability to now obtain the testimony of the defendant, Fred T. Evans, upon the present trial of this cause; that he expects to prove by the evidence of Fred T. Evans, the defendant, that the said defendant is not indebted in any sum whatsoever to the plaintiff; that the plaintiff knew or ought to have known that all his transactions in reference to the Hotel 'Evans' with the plaintiff were made by him as president of the hotel company, and not as an individual; that the said plaintiff had access to the hotel books, and knew or ought to have known that the said hotel was being operated by the hotel company and was owned by them, and was not owned or operated by this defendant as an individual.

"Affiant further states that he veritably believes he will be able to procure such evidence by the next trial of this cause.

"Affiant further states that he had hoped to have the said Fred T. Evans personally present at the trial of this cause, and believes he can so have him if this cause shall be tried in its regular order on the calendar of this court; that affiant has been informed by the said Fred T. Evans that he, Fred T. Evans, was not indebted to the plaintiff herein in any sum whatsoever."

A statement in an affidavit for a continuance, that it is

expected to prove by the absent witness what some one "ought to have known" about the transaction involved, is far from the statement of particular facts required by the statute, and is widely variant from the established law concerning evidence.

As in the case of a pleading, all intendments must be taken against the affidavit, and for the purpose of passing upon its sufficiency it can not be assumed that the witness would testify to anything more than the affidavit states in its least favorable view to appellant. *State v. Eisenmeyer*, 94 Ill. 96.

So construed, the affidavit only states that the appellant, who was the absent witness, would, if present, testify that the appellee ought to have known that the transactions were made with the appellant as president of the hotel company, and not with him as an individual. Such testimony would not be admissible if offered. There was no error in refusing the continuance.

This cause was placed on the "short cause calendar" of the Circuit Court and occupied in its hearing several hours, instead of one hour.

The appellant made objection to the cause being placed on that calendar, on the ground that it would occupy more than an hour, and repeated his objections at various stages of the trial after the fact of occupying more than one hour had occurred.

The statute concerning the short cause calendar makes it discretionary with the trial court to stop the trial at the expiration of one hour, or to proceed with the trial to final judgment.

While it may be that appellant's counsel relied upon his knowledge that the cause contained features and questions which rendered it impossible of trial within one hour, and believed that the court would stop the trial as soon as the fact clearly developed, and therefore did not call upon his client, who lived at a great distance, to be present when the cause was reached for trial, we can not say that he had any strict legal right to so rely and believe.

He must be chargeable with notice of the other fact, that

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the court might in its discretion proceed with the trial to a final judgment, even though more than one hour was required.

As we have lately said, in *Hettinger v. Beiler*, 54 Ill. App. 321, "it must be an extreme case when a court of review will interfere with the discretion of the trial court in such a matter."

Upon the real merits there does not seem to be much question but that the jury, by their verdict, were as regardful of the rights of the appellant, as, in justice, he could have expected.

There was ample evidence tending to show that he alone was the party against whom a recovery should be had, and the verdict was for less than one-half the amount that the evidence on the part of the appellant tended to establish as a reasonable compensation.

The refusal of the court to give appellant's instructions, numbered five to eleven, is assigned for error, but we think there was no error in so doing.

The fourth instruction given for the appellant was as follows:

"The court instructs the jury that if you believe from the evidence that the defendant, Fred T. Evans, was acting in the capacity of president of the company, and not as an individual, and that no services were rendered to the said Fred T. Evans as an individual by the plaintiff, nor any agreement to pay therefor by him, then you will find for the defendant."

That instruction embodied the same principle announced in the refused instructions, in different words, and it was not necessary that it should be repeated.

Upon the entire record the judgment was right, and it will be affirmed.

**Ridgely National Bank of Springfield, Illinois, v.
Nathaniel K. Fairbank.**

1. **AMENDMENTS—*The Proper Practice.***—The proper practice is to present the proposed amendment at the time leave to file it is asked, but the court in its discretion may give leave to amend at a future time.

2. **SAME—*Rule to Plead to.***—It is not proper to rule a party to plead to an amendment not on file and which may never be filed.

3. **DEFAULT—*With a Plea on File.***—A plea which answers any declaration that may be made in the case applies to all amendments, and it is error to enter a default with such a plea on file.

Memorandum.—Assumpsit on promissory note. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed June 18, 1894.

The opinion states the case.

HERRICK, ALLEN & BOYESEN, attorneys for appellant.

COLLINS, GOODRICH, DARROW & VINCENT, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit. The course of the pleadings was as follows:

The original declaration filed consisted of the common counts, only, with an affidavit of claim. To this the defendant pleaded the general issue with an affidavit of merits. Plaintiff, after leave obtained, filed an amended declaration consisting of special counts on a promissory note, and common counts, which amended *narr.* was stricken from the files on motion of the defendants, on October 13, 1893. Plaintiff on that date obtained leave to file a second amended declaration within one day, and at the same time defendant was ruled to plead to the same by October 18th. The second amended declaration, consisting of special counts on a promissory note and common counts with an affidavit of claim, was filed on October 14, 1893, and within one day.

Ridgely Nat. Bk. v. Fairbank.

On October 19th the defendant was defaulted for want of a plea in accordance with the rule and judgment entered. A subsequent motion to set aside this judgment and default was denied.

While the proper practice is to present a proposed amendment when leave to file it is asked, yet the court in its discretion may give leave to amend at a future time. *McFarland v. Claypool*, 128 Ill. 398; *Johnson v. Glover*, 19 Ill. App. 585.

It is not proper to rule a party to plead to an amendment not on file and which may never be filed.

The fact that as a matter of convenience to all parties, no one dissenting, rules to plead are frequently made under such circumstances, does not establish the propriety of such action when, as in the present case, the party against whom the rule is, objects to its entry.

The amendment having been filed, the defendant did not plead to the same as he had been ruled; thereupon, for want of compliance with such rule, his default was entered.

When such default was entered the plea of the general issue, filed to the original declaration, was on file.

This plea was appropriate to the amended declaration to which the defendant was ruled to plead; and being on file the defendant should not only not have been ruled to plead to a declaration, to which he already had a sufficient plea, but it was error to enter his default for want of a plea.

A plea which answers any declarations that can be made in the case applies to any amendment. *Wright v. The Lessees of Hollingsworth*, 1 Peters, 167; *McAllister v. Ball*, 28 Ill. 210.

The plea of the general issue filed in the present case was not verified; in this respect the present case differs from that of *Williams v. Miami Pow. Co.*, 36 Ill. App. 107, and also from the case of *Lehman v. Siggeman*, 40 Ill. App. 276. Moreover, as is said in *Lehman v. Siggeman*, "the plea of *non est factum* in an action of debt is not like the general issue in *assumpsit*."

The judgment of the Circuit Court is reversed and the cause remanded.

Anne O'Neill v. James C. Sinclair.

1. **REAL ESTATE BROKER—*Excess of a Fixed Price.***—The owner of real property agreed with a broker to give him all he got over a certain price for it. He procured a buyer who paid a sum for it in excess of a stipulated price. It was held that the broker was entitled to the excess.

2. **SAME—*Compensation When Serving Vendor and Vendee.***—A real estate broker having no discretion nor undertaking to use any endeavor to get for his principal anything but the price fixed, and no reliance being placed upon him that he would endeavor to do aught save the one authorized thing, it was held that his agency involved no duty but to accomplish a sale upon the terms fixed, and having done so he is entitled to be paid the agreed commission, although he may have also served the purchaser.

3. **SAME—*Who is, Under Chicago Ordinances.***—A single sale does not, within the meaning of the Chicago ordinance, constitute one a real estate broker, where he has not held himself out as such broker, but merely done what he was asked by certain persons to do.

Memorandum.—Assumpsit for broker's commission. Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 30, 1894.

The opinion states the case.

APPELLANT'S BRIEF, JESSE HOLDOM, ATTORNEY.

To be secretly in the service of the opposing party, while ostensibly acting for his principal only, is a fraud upon the latter and a breach of public morals, which the law will not tolerate. If, therefore, each of the parties to a transaction was entirely ignorant of the broker's relations to the other, such double services on the part of the broker will defeat his right to recover commissions from either of them. If one of the parties only was ignorant, he will certainly be absolved from the duty to pay commission. *Sell v. McConnell*, 37 Ohio St. 396; *Rice v. Wood*, 113 Mass. 133; *Scribner v. Collar*, 40 Mich. 375; *Lynch v. Fallon*, 11 R. I. 311; *Meyer v. Hanchett*, 39 Wis. 419; *Raisin v. Clark*, 41 Md. 158; *Walker v. Osgood*, 98 Mass. 348; *De Steiger v. Hollington*, 17 Mo. App. 382; *Webb v. Paxton*, 36 Minn.

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532; Morrison v. Thompson, L. R., 9 Q. B. 480, 10. Eng. Rep. 129; Robbins v. Sears, 23 Fed. Rep. 874; Bates v. Copeland, 4 McArth. (D. C.) 50; Collins v. Fowler, 8 Mo. App. 588; Farnsworth v. Hemmer, 1 Allen (Mass.), 494.

The question necessary to decide in determining who is a real estate broker is: Is the procuring of a purchaser, a step or element in the selling of real estate or in the negotiation of the sale of real estate? and it is apparent that it is. In order to negotiate for a sale the procuring of some one who desires to purchase real estate is essential, and in order to make a sale the procuring of a purchaser is a *sine qua non*. In most cases all that the broker does is to procure a purchaser satisfactory to his principal, and when he does this he is entitled to his commission. McConaughy v. Mehennah, 28 Ill. App. 169; Carter v. Webster, 79 Ill. 435; Green v. Hollingshead, 40 Ill. App. 195.

APPELLEE'S BRIEF, T. A. MORAN, ATTORNEY.

Appellee contended that he was engaged upon special terms by appellant to find a purchaser for her property at a certain sum fixed and agreed upon; therefore he can legally receive compensation from appellant, even when he has acted as agent for the person who purchased from her where each is ignorant of his employment by the other. Mechem's Agency, Sec. 973; Rupp v. Samson, 16 Gray, 398; Siegel v. Gould, 7 Lansing, 177; Ranney v. Donovan, 78 Mich. 318; Montross v. Eddy, 94 Mich. 100; Haviland v. Price, 26 N. Y. S. 757.

A person who is not engaged in exercising the business of a real estate broker in Chicago, may recover compensation for services rendered in finding a purchaser for the real estate of another under a special contract without being licensed as a real estate broker. Chadwick v. Collins, 26 Pa. St. 138; Sheples v. Scott, 85 Pa. St. 329; Johnson v. Hulings, 103 Pa. St. 498; Love v. State, 20 S. W. Rep. 978; Eldorado Co. v. Meiss, 54 Pac. Rep. 716; Graham v. State, 13 So. Rep. 883; City of East St. Louis v. Box, 43 Ill. App. 276; Jackson v. Hough, 18 S. E. Rep. 475.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellee is, and for many years had been, in the hardware business in Chicago; he was induced by one Alexander to procure appellant to agree to sell certain property she owned, and to fix a price thereon. It seems to have been understood between appellee and Alexander that if appellee succeeded in his undertaking, he was not to be paid by Alexander, but that if Mrs. O'Neill concluded to sell and appellee brought to her Alexander as a purchaser, appellee, it was believed, would be able to obtain from her a commission for the sale thus made.

Appellee talked with Mrs. O'Neill at various times for several years about the sale of her property. He did not inform her that he knew that Alexander would like to buy it, and he does not seem to have been bound to tell her this, because during these years he was in no wise engaged or authorized by her to sell the property or to negotiate in respect thereto. Not being in any respect her agent he did not owe to her any duty of which the law can take notice. They were neighbors and their duties toward each other in respect to this matter were equal. She was under no obligation to him, and he owed no duty to her.

Had he gone out, found and brought to her a purchaser, ready and willing to pay an acceptable price, she, having neither engaged nor promised anything to appellee, might have sold to such purchaser without being bound to compensate appellee for what he had done, because she had never authorized him to do anything in respect to said property, and had not known he was doing anything.

Finally, she one day told appellee that she would sell the property for \$200,000. Appellee asked her if she would pay him a commission if he sold the property for that sum; she replied that she would not; that she would have \$200,000 clear. He then asked her if he got \$205,000 if she would give him \$5,000; she told him that she would.

Appellee brought Alexander to her, a contract of sale was made and carried into execution, she being paid \$205,000

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by Alexander for her property. It does not clearly appear that appellee ever had a claim against Alexander for compensation from him. The relation between him and Alexander seems to have been that he knew that Alexander wished to buy, and that Alexander thought it best that Mrs. O'Neill should not know of this. Alexander gave him the opportunity to obtain a commission if he brought from Mrs. O'Neill an offer which he, Alexander, accepted, appellee endeavoring to get as low an offer as he could. Appellant does not seem to be dissatisfied with what appellee did, but to have withheld payment because of the claim of another party, to commissions.

Not having been authorized by her to negotiate a sale, or to do anything except to sell for a fixed price and upon fixed terms, viz., all cash, he was not bound to do anything save to endeavor to carry out her expressed wish, and is entitled to the reward promised for having obtained for her the price she asked.

Having in his agency for appellant no discretion, not undertaking to use any endeavor to get for his principal anything but the price she had fixed, no reliance being placed upon him that he would endeavor to do aught save the one authorized thing, his agency involving no duty but to accomplish a sale for \$200,000, for net cash, he is entitled to be paid the agreed sum, although he may have also served the other party. Mechem's Agency, Sec. 973; Rupp v. Samson, 16 Gray, 398; Siegel v. Gould, 7 Lansing, 177; Ranney v. Donovan, 78 Mich. 318; Montross v. Eddy, 94 Mich. 100; Haviland v. Price, 26 N. Y. S. 757.

At the time this sale was made there was in force in Chicago an ordinance as follows:

"Be it ordained by the city council of the city of Chicago:

Sec. 1. It shall not be lawful for any person to exercise within this city the business of a money changer or banker, broker, or commission merchant, including that of merchandise, produce or grain broker, real estate broker and insurance broker, without a license therefor.

Sec. 3. A real estate broker is one who for commission or other compensation, is engaged in the selling of or negotiating sales of real estate belonging to others, or obtains or places loans for others on real estate."

Appellee did not have a license. The definitive clause of the ordinance does not seem to include a person who has had to do with only one sale.

A single sale does not, within the meaning of the ordinance, constitute the exercise of the business of a real estate broker, where the person has not held himself out as such broker and has merely done what he was asked by a certain person to do. *Chadwick v. Collins*, 26 Pa. St. 138; *Sheples v. Scott*, 85 Pa. St. 329; *Johnson v. Hulings*, 103 Pa. St. 498; *Love v. State*, 20 S. W. R. 978; *Eldorado Co. v. Meiss*, 54 Pac. R. 716; *Graham v. State*, 13 So. R. 883; *City of East St. Louis v. Box*, 43 Ill. App. 276; *Jackson v. Hough*, 18 S. E. R. 475.

Appellee is not within the terms of the ordinance; he never claimed or held himself out to be a real estate broker; he has obtained a customer for one piece of property, at the price and the terms given to him by the owner, and is entitled to receive the compensation appellant promised to give him for bringing such customer to her.

The judgment of the Superior Court is affirmed.

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Valentine Werk v. Illinois Steel Company.

1. NEGLIGENCE AND ORDINARY CARE—*Question of Fact*.—Whether a party was in the exercise of ordinary care, is a question of fact to be determined by the jury; it is only where the facts are such that a reasonable mind can draw from them but one conclusion, that negligence may be inferred as a matter of law. Where reasonable minds differ, negligence is a question of fact.

2. ORDINARY CARE—*Burden of Showing*.—The burden of showing the exercise of ordinary care is upon the party seeking to recover for a personal injury caused by the negligence of another.

3. MEASURE OF PROOF—*Care—Scintilla of Evidence*.—A bare scintilla of evidence is not enough to entitle a party to recover.

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4. PRACTICE—*Withdrawing the Case from the Jury.*—While questions of negligence are ordinarily questions of fact to be passed upon by a jury, yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict in opposition to it, it may direct a verdict for the defendant.

Memorandum.—Action for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed June 4, 1894.

STATEMENT OF THE CASE.

The suit was brought to recover for two injuries. One was the burning of the legs of appellant by molten metal about July, 1891. The other was the injuring of appellant by means of an empty ladle which ran upon and cut his foot on October 5, 1891.

Appellant was a laborer in the employ of appellee in its steel mills at South Chicago. For more than a year before the first injury he had been engaged in straightening up ladles with the assistance of another man, and he was actually engaged in this work when both injuries happened. The place on which appellant worked was called "hot metal hill."

These ladles were large iron kettles lined with clay, which rested on four wheeled cars and were moved on a railroad track by means of an engine. They were brought up the hill where appellant worked, full, or partly full, of molten metal. If they were not full they were filled from a hot metal cupola which stood there.

On the top of the hill there were three parallel tracks, which ran north and south, and were only three or four feet apart. The east track ran close to the cupola, which was east of it. The ladles filled with hot metal were always pushed up the hill on the east track, and were pushed with the engine behind them from the south to the north. If there were too many full ladles to be handled properly on the east track the engine (not the one which brought the ladles there, but one which came from the opposite direc-

tion) put some of them, full, on the middle track, where they stood till taken into the converting mill.

They were taken into this mill one at a time by an engine which came from the mill for them. This was not the engine which brought the full ladles to the locality of the cupola, but one that came from the mill south to the full ladles and took them, one by one, into the mill. They were then emptied and brought back, one by one, and placed on the west track of the three, where they were turned up and then taken away to be filled again. The west track never had anything on it but empty ladles. These ladles were brought, one by one, from the mill, by being pushed south on the west track to the vicinity of the cupola.

When a ladle was taken into the mill it was turned down on its side and the molten metal ran out. It was brought in this condition, turned down on its side and empty, to the west track. It was the duty of appellant and the man working with him to straighten the ladle up so that its top would be level and it could be filled up again. This was accomplished by means of levers in certain machinery at the end of the ladle. The average time required to turn up a ladle was fifteen minutes. It was hard work, requiring much strength.

In doing this work the men engaged in it stood between the rails of the track upon which the ladle ran. They could not stand in any other place and do the work. The ladles were seven or eight feet high and two or three feet higher than the heads of the men working at them.

The engine which brought the full ladles on the east track to the vicinity of the cupola, would go back to a switch and come north on the west track and take away with it the empty ladles standing on the track. No ladles were taken down the hill until after they had been straightened up. This was the only place for leveling ladles up, and they were taken away only to be filled and could not be filled unless leveled up.

There was a great noise where these ladles were straightened up, caused by the blowing of the vessels into which the

molten metal was turned, the engines blowing air into the cupola and the noise consequent upon the carrying on of such a business. The noise was so great that the engine which brought the full ladles to the locality could not be heard. This engine sometimes stayed in the locality pushing half empty ladles under the cupola. There was no regularity about the time when the engine would come for the empty ladles.

Appellant testified: "When I was hoisting ladles the engine came along with the full ladles, and if we didn't watch him, sometimes he came along and took the empty ladles while we were at work." "I didn't know when the engine would come for the empty ladles."

Sometimes it came and took empty ladles when appellant was at work. When appellant was burned, in May or July, 1891, the engine bumped a ladle on the middle track; he testifies that always before, the engine took the ladles easy, but that time it bumped it strong; that if the engine had come up easy he would not have then been hurt, and that if the engine had come up easy in October he would not then have been hurt, but that the engine came up strong in October and bumped on the ladles.

Appellant testified that when he was at work he could not see this engine come to the locality. The ladle on which he was working was two or three feet higher than his head and was between him and the engine.

He was incapacitated from work for two or three weeks by the first injury, and then went back to work for appellee, his legs still being, and ever since remaining, sore.

On the night of October 5, 1891, when appellant went to work, the boss told him to hurry up and work fast. They were running a race. He worked at hoisting ladles till between two and three o'clock in the morning. He says there was no light there but that which came from the blasts blowing in the steel mills. There were from six to ten empty ladles on the west track. The north one of these ladles was turned down and appellant and his partner were in the act of straightening it up.

Appellant stood at the north end of the ladle, between the rails of the track on which it rested; all the other empty ladles were south of the ladle on which he was working. It was between him and them, and hid the other empty ladles from his view. While he was thus situated and engaged, an engine came against the empty cars to the south of the one on which appellant was working and shoved them north so as to strike the ladle on which he was working and drove it against him and severely wounded his foot. No warning of any kind was given of the approach of the engine nor that any of the empty ladles were about to be moved.

When appellant was injured he had his foot on the railroad track, and an engine came along and pushed the wheel of the car on which the ladle at which appellant was working stood, upon the foot of appellant; the wheel caught his foot. Appellant and one Polarck were turning up the same ladle when appellant was hurt, and each was working at the north end of the north ladle between the tracks.

Polarck, a witness for plaintiff, testifies:

“Mr. Brandt. Q. What happened there?

A. When we were working on turning up the ladle he held his foot on the rail, and just when the cars were pushed the wheel caught his foot. Plaintiff was crying, and when he got loose he hopped on one foot over to the scales.

Q. How long did he lie down there before he got up?

A. He didn't lay on the track at all.

Q. When the car struck him what happened to him?

A. He went on the scales. There is a bench there and he sat down on the bench and sat there.

Q. How far did the ladles move when they were struck?

A. About half an inch or an inch.”

Upon the close of the appellant's evidence in chief, the court, on motion of the counsel for the defendant, held that appellant's evidence did not entitle him to have the jury pass upon his right to recover for the injuries he suffered by the accident which occurred in October, A. D. 1891, and that he would instruct the jury to find for appellee as to all matters growing out of said accident. At the same time

Werk v. Illinois Steel Co.

the court held that the July accident might be passed upon by the jury.

There was a verdict and judgment for the plaintiff for \$256, from which he prosecutes this appeal.

BRANDT & HOFFMANN, attorneys for appellant.

APPELLEES' BRIEF, WILLIAMS, HOLT & WHEELER AND E. PARMALEE PRENTICE, ATTORNEYS.

Appellees contend that, from the earliest reported case in our State, where the question was passed upon, to the present time, a period of more than thirty years, the general rule has been declared and recognized in opinions announced from time to time, that in order to recover for injuries from negligence it must be alleged and proved that the party injured was, at the time he was injured, observing due or ordinary care for his personal safety, and cite *A. B. R. R. Co. v. Grimes*, 13 Ill. 585; *C. & M. R. R. Co. v. Patchin*, 16 Id. 198; *Dyer v. Talcott*, Id. 300; *G. & C. U. R. R. Co. v. Yarwood*, 17 Id. 509; *C., B. & Q. R. R. Co. v. Dewey*, Admr., 26 Id. 255; *C., B. & Q. R. R. Co. v. Hazzard*, Id. 373; *I. C. R. R. Co. v. Simmons*, 38 Id. 242; *C. & A. R. R. Co. v. Gretzner*, 46 Id. 76; *I. C. R. R. Co. v. Weldon*, 52 Id. 294; *I. C. R. R. Co. v. Schultz*, 64 Id. 177; *C., B. & Q. R. R. Co. v. Van Patten*, Id. 510; *C., B. & Q. R. R. Co. v. Lee*, 68 Id. 579; *T., W. & W. Ry. Co. v. McGinnis*, 71 Id. 346; *C. R. R. Co. v. Godfrey*, 71 Id. 507; *I. C. R. R. Co. v. Hall*, 72 Id. 222; *G. T., M. & T. Co. v. Hawkins*, Id. 388; *C. & A. R. R. Co. v. Becker*, Admr., 76 Id. 31; *T. W. & W. R. R. Co. v. Jones*, Id. 315; *O. & M. R. R. Co. v. Stratton*, 78 Id. 88; *C. & N. W. Ry. Co. v. Hatch*, 79 Id. 137; *C., B. & Q. R. R. Co. v. Harwood*, 80 Id. 88; *C., B. & Q. R. R. Co. v. Damerell et al.*, 81 Id. 450; *I. C. R. R. Co. v. Green*, Id. 19; *Kepperly v. Ramsden*, 83 Id. 354; *I. C. R. R. Co. v. Lutz*, 84 Id. 598; *Ind. & St. Louis R. R. Co. v. Evans*, 88 Id. 63; *T. W. & W. Ry. Co. v. Grable*, Id. 441; *C., B. & Q. R. R. Co. v. Harwood*, 90 Id. 425; *Austin, Admx., v. C., R. I. & P. R. R. Co.*, 91 Id. 35; *C. & A. R. R. Co. v. Pennell*, 94 Id. 448; *W. Ry. Co. v.*

Elliott, 98 Id. 481; City of Joliet v. Seward, 99 Id. 267; City of Bloomington v. Perdue, Id. 329; Schmidt v. Sinnott, 103 Id. 160; C., B. & Q. R. R. Co. v. Johnson, Admx., Id. 512; City of Bloomington v. Chamberlin, 104 Id. 268; City of Chicago v. Stearns, 105 Id. 554; L. E. & W. Ry. Co. v. Zoffinger, 107 Id. 199; Mo. F. Co. v. Abend, Admr., Id. 44; C., B. & Q. R. R. Co. v. Warner, 108 Id. 538; C., B. & Q. R. R. Co. v. Avery, 109 Id. 314; W., St. L. & P. Ry. Co. v. Wallace, 110 Id. 114; Myers, Admx., v. I. & St. L. Ry. Co., 113 Id. 386.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

We do not understand counsel for appellant to dissent from the position of appellee, that in order to recover for injuries occasioned by negligence it must be alleged and proved that the party injured was at the time he was injured observing due or ordinary care for his personal safety.

What they do insist on is that the question of whether the party injured was at the time observing ordinary care for his personal safety, must always be submitted to a jury, and that there can be no conduct so reckless and indifferent to obvious danger that a court may pronounce the same to be clearly a want of ordinary care, and therefore refuse to submit the cause to a jury.

We understand the rule to be that whether a party was in the exercise of ordinary care is a question of fact, to be determined by the jury, and that it is only where the facts are such that a reasonable mind can draw from them but one conclusion, that negligence may be inferred as a matter of law; that where reasonable minds might differ, negligence is a question of fact. L. S. & M. S. Ry. Co. v. Johnson, 135 Ill. 641; I. C. R. R. Co. v. Nowicki, 46 Ill. App. 566; Chicago, St. Paul & Kansas City Ry. Co. v. Anderson, 47 Ill. App. 91; Lincoln Ice Co. v. Johnson, 37 Ill. App. 453; Chicago & Eastern Illinois Ry. Co. v. Connor, 119 Ill. 586; Chicago City Ry. Co. v. Robinson, 127 Ill. 12; Terre Haute & Ind. Ry. Co. v. Voelker, 129 Ill. 540; Abend v. Railroad Co., 111 Ill. 202; Simmons v. Ry. Co., 110 Ill. 340; Breeze v.

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Powers, 80 Mich. 172-178; Cooley on Torts, 670-804 of 2d Ed.; Beach on Contributory Negligence, 454; Lake Shore Foundry Co. v. Rakowski, 54 Ill. App. 213.

The burden of showing that he was in the exercise of ordinary care is upon the party seeking to recover for a personal injury occasioned by the alleged negligence of another. Calumet Iron & Steel Co. v. Martin, 115 Ill. 358-370.

A bare scintilla of evidence is not enough to entitle a party to recover. Simmons v. Railroad Co., 110 Ill. 340-346; Bartelott v. International Bank, 119 Ill. 259-292; Phillips v. Dickinson, 85 Ill. 11-15.

While questions of negligence or of contributory negligence are ordinarily questions of fact to be passed upon by a jury, yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict in opposition to it, the court may withdraw the case from the consideration of the jury, and direct a verdict. Railroad Co. v. Houston, 95 U. S. 697; Schofield v. Railway Co., 114 U. S. 615; Railroad Co. v. Converse, 139 U. S. 469; Aerkfetz v. Humphreys, 145 U. S. 418.

In the present case, it appears that appellant had for eighteen months continuously worked at the place, and in the doing of the very thing at which he was engaged when injured, in October, 1891; he was not only entirely familiar with the way in which the work of pushing up and removing these cars was done, but he had only a few months previous been injured, because an engine pushed a car up the incline, not easily, but so that it bumped. He also must have known that it is practically impossible for a locomotive to always push a train of heavy cars up an incline with such steady gentleness that they will not come with a force dangerous to a human limb if it be between the cars, and an object against which they are pushed; the daily observation of every one who witnesses the coupling of cars, even upon a level, teaches this.

Notwithstanding this, he stood with his foot upon the track upon which the cars were being pushed; stood so that the car holding the ladle upon which he was working,

ing pushed, as his witness, the companion working with
m, says, half an inch or an inch, his foot was caught under
e wheel.

There is not a scintilla of evidence to show that there was
y necessity for his placing his foot on the rail; his com-
nion, doing the same work that appellant was, remained
injured. Appellant was injured because his foot was on
e rail; this, no reasonable, unbiased mind can doubt. His
mplaint is that no warning was given of the approach of
e cars; he does not show that it was customary to give or
at he had any reason to expect warning, and it clearly
pears but that for his want of ordinary care he would not
ve been injured.

Appellant's counsel, in the reply brief by them filed, say
at appellant flatly contradicts Polarck's statement that
pellant had his foot on the rail. We have searched the
cord in vain to find such contradiction. Appellant did tes-
ify as follows:

"Mr. Brandt: Were you between the two rails
ack that this ladle was on? A. Yes."

This is very far from being, as counsel assert, a
ction of the statement of plaintiff's witness, Polarck,
pellant had his foot on the rail. On the contrary,
tirely consistent with Polarck's statement.

Undoubtedly, if there were any dispute in the evi-
dence out this, on a motion to instruct the jury to find
endant, the doubt should be resolved in favor of the
aintiff.

The plaintiff, after Polarck had testified, was again
the witness stand but failed to deny Polarck's state-
ment, that he, appellant, had his foot on the rail.

Photographs of appellant's person, showing the
ereon, etc., were used on the trial; these photographs
are not included in the record, but there is a description
given of the injury to, and scar upon his right foot,
and from this it is manifest that it was cut while he was
standing with it upon the rail.

Appellant testified:

“Q. Now then, tell how you were hurt; tell what the hurts were; I don’t mean the manner. A. When I was struck I was dazed and I don’t know what was the matter with me, and my partner dragged me from the track over to the scales, and then they notified the foreman Brady.
* * *

Q. Whereabouts was the wound? How far did it extend?
A. It was on the foot; right on top of the foot.

Q. Which foot? A. That was on the right foot.

Q. How far did it go back on the foot? A. The foot was sore up to the ankle, and it hurt me from about the knee and about the thigh; I struck my hip.” * * *

“Mr. Brandt: I ask you this question, if this scar which appears—I want the jury to see that scar, the scar extending along the top of the foot from about the division between the second toe from the little one and running up to the ankle; was that scar on there or anything of the kind before the ladle ran on you in 1891? A. No, I didn’t have any scar or mark before.”

Upon cross-examination appellant testified:

“Mr. Prentice: You said at the time of the accident in October your foot was under the wheel when you fell. Do you mean that the wheel went over your foot completely?

A. No, the wheel stopped on my foot; I was crying aloud, and they stopped it.

Q. It just pushed your foot along the track a little way, was that it? A. No, I don’t know.”

If appellant was exercising ordinary care and appellee was guilty of negligence in moving the ladle, and appellant was injured in consequence thereof, then, as counsel for appellant urge, it is immaterial whether the ladle was moved an inch, “a yard or a mile.” There is no direct evidence, save that of Polarek, as to the distance the ladle was moved, while there is evidence, undisputable, that appellant was not in the exercise of ordinary care.

As to the accident in May or July, 1891, this suit to recover for the accident of October, 1891, was begun December 14, 1891; a declaration based upon that accident only,

was filed January 6, 1892; the declaration was, on the 10th day of March, 1892, amended by the filing of additional counts, one of which was based upon the accident of July, 1891.

The case upon the accident by burning, seems to have been fairly tried and submitted, and we see no sufficient reason for interfering with the conclusion arrived at by the court and jury.

Appellant complains that the court refused to instruct or tell the jury that the plaintiff had not asked for any instructions. We do not think that a court should be required to do this.

Instructions should be given to the jury, not as the plaintiff's or defendant's, or as requested by either, but as given by the court.

The judgment of the Superior Court is affirmed.

MR. JUSTICE GARY dissents.

**Chicago Stamping Company v. Solomon L. Bignall,
Edmond B. Bigelow and Claude Bigelow,
Impleaded with Charles J. Glenn.**

1. **JOINT LIABILITY—*Not To Be Raised by Plea in Abatement.***—The defendants in an action against them as partners upon a promissory note, pleaded in abatement that they were not partners. The plea was a nullity. To deny their joint liability, etc., the plea should have been the general issue verified. Under the plea as pleaded they could not, on the trial, have disputed their liability.

Memorandum.—Assumpsit on a promissory note. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed June 18, 1894.

The opinion states the case.

CHARLES M. STURGES, attorney for appellant.

Chicago Stamping Co. v. Bignall.

BOTSFORD & WAYNE, attorneys for appellees; E. H. GARY, of counsel.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The declaration began thus: "The Chicago Stamping Company, a corporation, etc., plaintiff, by Charles M. Sturges, its attorney, complains of Solomon L. Bignall, Edmond B. Bigelow, Claude Bigelow and Charles J. Glenn, late copartners in business, under the style and firm name of 'Chicago Lamp Company,' defendants, etc., of a plea of trespass on the case on promises. For that, whereas, the said defendants heretofore, to wit: On the fifteenth day of September, in the year of our Lord, one thousand eight hundred and eighty-six, at Chicago, to wit, at the county aforesaid, made their certain note in writing, commonly called a promissory note, bearing date the day and year last aforesaid, and then and there delivered the said note to the said plaintiff, in and by which said note the said defendants, by the name, style and description of 'Chicago Lamp Co., C. J. Glenn, Treas.,' promised to pay to the order of said plaintiff, by the name, style and description of 'Chicago Stamping Co.,' \$229.94 on the twenty-seventh day of November, in the year of our Lord, one thousand eight hundred and eighty-six, at 238 Lake street, in Chicago, in the State of Illinois, for value received. By reason whereof," etc.

Five other counts were very like the first. The defendants pleaded in abatement that they were not partners. The plea was a nullity. *Karch v. Emerick*, 59 Ill. 184.

The plea should have been the general issue verified (*Ibid.*), and until *Frankland v. Johnson*, 147 Ill. 520, the defendants could not on the trial have disputed their liability. *Frankland v. Johnson*, 46 Ill. App. 430, and see also *Supreme Lodge v. Zulke*, 30 Ill. App. 98, S. C. 129 Ill. 298, which cases have introduced a good deal of uncertainty.

The court instructed the jury to find for the defendant. This was error and the judgment is reversed and the cause remanded.

Carey-Lombard Lumber Company v. Mrs. John Hunt.

1. **EVIDENCE—Accounts.**—If a party puts in evidence an account for any purpose, he makes the whole of it evidence.

2. **PAYMENTS.—Application of in Accounts.**—Where no application of the credits to the payment of any specific charges is shown, they will be applied to the earliest items of the account.

8. **ASSIGNMENT OF ERRORS.—Where Plaintiff has Failed to Make Out a Case.**—Where a plaintiff wholly fails to make out a cause of action upon the evidence, he can assign no errors upon the instructions.

Memorandum.—Assumpsit. Appeal from the Circuit Court of Cook County; the Hon. SAMUEL P. McCONNELL, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed June 4, 1894.

ISRAEL COWEN, attorney for appellant.

WINSTON & MEAGHER, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

For the appellee the court gave an instruction substantially like the first one held to be erroneous in *Wickersham v. Beers*, 20 Ill. App. 243, but made still worse by stating that "it frequently happens that the witness" makes mistakes, etc., and besides there was nothing in the case to which the instruction was relevant.

Language used by courts on questions of fact, among which is credit due to witnesses, is not to be repeated in instructions to juries. *Fairbury v. Rogers*, 98 Ill. 554; *Pennsylvania Co. v. Conlan*, 101 Ill. 93.

But yet this judgment is not to be reversed.

The suit is for lumber alleged to have been sold and delivered by the appellant to the appellee. There is conflicting testimony whether she promised to pay for lumber charged by the appellant to a contractor who built a house for her, but as the appellant says, sold only upon her credit; but there is no such evidence in the record as would justify a verdict that the lumber for which it charged, was in fact ever delivered.

There is proof in a general way that the lumber with which the house was built was furnished by the appellant. Also that the contractor has paid \$500 specially on account of that lumber. But of items of the total account of \$870.64, or of any acknowledgment of indebtedness by her, there is no proof. The appellant put in what purported to be receipts for lumber delivered at the building, several of which were not signed at all; most of them were signed McLellan, and one of them by another name, without any proof of the signatures; but a bare inspection of them shows that the same hand that prepared them for signature, which must have been done in the office of the appellant, also wrote the signatures.

It is true that the appellee—defending on the ground that if liable at all it was only as guarantor, and therefore not bound without a writing—showed by the ledger of the appellant that the lumber was charged to McLellan. But on no principle of common sense or justice does that act make the ledger evidence that the items were correct.

. The correctness of the account was a matter of which she could not have knowledge.

The appellant had admitted during the trial that the account was kept under the name of McLellan, and the putting in of the book was wholly useless.

While the general rule is that if a party puts in an account for any purpose he makes the whole of it evidence, yet here was an account aggregating several thousand dollars, on which the credits exceeded three thousand dollars, and the debit balance was less than the sum claimed from the appellee. No application of the credits to the payment of any specific charges was shown, and therefore they would be applied to the earliest items of the account. *Dehner v. Helmbacker*, 7 Ill. App. 47.

The items later than any that the appellant could claim of the appellee exceeded the debit balance.

The credits thus applied extinguished the charges which the appellant sought to recover from the appellee. It is not improbable that the very money the appellee had paid to the contractor had been received by the appellant.

The appellant having, therefore, no case, can not complain of instructions. *Waldron v. Brazil and Chicago Coal Co.*, 7 Ill. App. 542.

"Where a plaintiff wholly fails to make out a cause of action upon the evidence, he can assign no error upon the instructions." *Wilcox v. Raddin*, 7 Ill. App. 594.

The judgment is affirmed.

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Henry L. Glos et al., Impleaded, etc., v. Charles F. Swigart.

1. **TAX SALES**—*Theory Upon Which They Are Made*.—The theory upon which a tax sale is made is that the buyer will take as small a portion of the property offered as is equal in value to the amount of taxes due, and the owner is entitled to have a fair opportunity given to buyers to bid. As much time should be given to bidders in making tax sales as in other public auctions; the rules governing both are the same.

2. **CHANCERY PRACTICE**—*Entering Decrees*.—It is upon the pleadings and the findings of the master that the court acts in rendering its decree. A party failing to file with the master his objections to the report and his exceptions with the court, can not, after decree, be heard to urge that the proofs do not sustain the report or decree.

3. **APPELLATE COURT PRACTICE**—*Objections Must be Made in the Court Below*.—Objections not taken in the court below can not be made in the Appellate Court.

Memorandum.—Bill for injunction. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed June 4, 1894.

H. S. MECARTNEY, attorney for appellants.

W. A. PHELPS, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was a bill filed by Charles F. Swigart to enjoin the issue of a tax certificate to defendants, Henry F. Meyer and Henry Glos, or either of them, and for an order that a tax

Glos v. Swigart.

certificate of sale of the said premises be issued to the complainant. Due service of process upon Meyer and Glos having been made, their default for want of answer was entered.

The bill having been by Henry Wulff and Charles Kern answered, the cause was referred to a master to take proofs and report his conclusions thereon.

Proofs were taken by the master, and he returned the same with his conclusions, among which were, as abstracted by appellant, the following:

“Master’s report, filed December 26, 1893, by James R. Mann, master in chancery, finds the following to be a fair statement of facts in the case:

In the course of making a sale of lands, etc., for delinquent taxes for the general taxes of 1892, by the county treasurer, through his representative, William Batterman, said premises were exposed for sale. That Mr. Batterman has conducted these sales for many years, and is thoroughly conversant with the method of transacting such business, and there is no evidence whatever to indicate any suspicion that Mr. Batterman did not act in this matter in perfect good faith, or did not intend to do that which he thought was right and proper. It appears that when the property was offered for sale, there were a number of tax buyers in the room, and that a number of them bid on the property, all bidding at once. The only bid which Mr. Batterman heard distinctly was that of one C. G. Marhoefer, who was a regular tax bidder for Henry L. Glos, but bidding in the name of Meyer, and in accordance with the usual practice in such cases, the property was immediately knocked down to Meyer, whose bid was for the whole premises.

Further finds that Swigart, the owner, had made arrangements with Rolla M. Davis to bid in the property when reached at sale. That immediately after the property had been knocked down to Meyer, Davis set up a claim that he had bid a vigintillionth for the premises.

That testimony as to whether Davis made this bid or not is contradictory, Davis swearing that he made the bid at the instant the property was put up, and Henry L. Glos

swearing that he was watching Davis, and that he was otherwise engaged and made no bid, and Batterman swears that the only bid he recognized was that of Meyer.

The theory of tax sales is that the tax buyers will take as small a portion of the property offered as is equal in value to the amount of taxes due, and the owner is entitled to have a fair opportunity given to tax buyers to bid. Such opportunity was not afforded in this case; at the same moment several bids were received and the property was instantly knocked down to one of the bidders without any opportunity on the part of the other bidders to bid for a fraction of the property. Davis was entitled to have an opportunity to bid for a vigintillionth of the property, and the owner of the property was clearly entitled to have an opportunity given to any of the tax buyers to bid for a fraction of the property, so that the taxes on the whole lot might thereby be paid.

While it may not be possible as a matter of business transaction to give as much time to bidders in the matter of making tax sales as should be given in other public auctions, still the rules governing them are the same.

Recommends a permanent injunction against county collector and county clerk, restricting them from completing the sale to the defendants, Glos and Meyer, and finds that complainant made a tender the next day after the sale to the county treasurer of the taxes, etc., due, and still keeps his tender good.

Finds further, that as the sale to Meyer has not been completed by the issuance of a certificate, upon the setting aside of the said pretended sale, the collector would be required to proceed to make a sale of the property for the taxes due, unless the complainant should pay the amount of the taxes. If, however, the complainant keeps his tender good, he is entitled to pay the taxes before any sale is actually made.

In my opinion the complainant is entitled to prevent the carrying out of the sale to Meyer or Glos, and is entitled to pay the taxes to the collector and to receive a receipt for the same."

No objection to this report was made before the master, and no exceptions thereto were filed by appellants.

The court, upon the coming in of the master's report, confirmed the same, and entered a decree that said Kern and Wulff be perpetually enjoined from issuing any certificate of sale of the said premises to said Glos or Meyer, or completing said sale, and that said Glos and Meyer be enjoined from demanding or receiving from said Kern or Wulff any certificate of sale of said premises, and also that the clerk of the court receive the said sum of money aforesaid, to be delivered to defendant, Charles Kern, at his request, and that the same be received and shall be in full satisfaction and discharge, and in full payment of the taxes of 1892, upon said real estate, and also ordered that said real estate be freed and disincumbered of the attempted sale thereof, on August 28, 1893, and that said sale be vacated, set aside and held for naught, and that said real estate be freed and disincumbered of the taxes thereon for the year 1892.

From this decree Glos and Meyer prosecute this appeal. The default of Meyer and Glos is not only an admission of the allegations of the bill, but the findings of the master, upon proofs taken, sustain such allegations. Appellants did not object to the master's report, nor appear in the cause until after a final decree had been entered.

It is upon the pleadings and the findings of the master that the court acts in rendering a decree upon a master's report. One who has failed to file with the master objections to the report and exceptions to the same with the court, can not, after decree, be heard to urge that the proofs do not sustain the report or decree. *Brown v. McKay*, 51 Ill. App. 295; *Kaegebein v. Higgle et al.*, 51 Ill. App. 538; *Waska v. Klaisner*, 43 Ill. App. 611.

When a decree is based upon a master's report, it is upon the findings of the master that the court acts, not upon the proofs presented to the master, just as at law upon trial by jury the judgment is rendered upon the verdict, not upon the evidence heard; in either case, the court may overrule the decision of the tribunal that has passed upon the facts,

but if the report of the master or the verdict of the jury is sustained, the decree or judgment is based upon such finding or verdict.

Objections not taken in the court below can not be made in the Appellate Court. *Hudgins v. Kemp*, 20 Howard, 45-54; *New Orleans v. Gaines*, 15 Wall. 624; *Train v. Gridley*, 36 Ind. 241; *Smalley v. Corliss*, 37 Vt. 486-492; *Daniell's Ch. Pr.*, Vol. 2, 1316.

While the decree is not in accordance with the prayer of the bill, the relief granted is such as the allegations of the bill warrant and such as is equitable and just.

Appellants are in no wise harmed by the departure in the relief granted from the prayer of the bill. Errors which are harmless may be disregarded. *Reid v. Foster*, 37 Ill. App. 76; *Hair v. Barnes*, 26 Ill. App. 580.

Had appellant objected to the relief granted as not being such as the bill prayed for, the court would doubtless have allowed an amendment of the prayer of the bill.

The decree of the Superior Court is affirmed.

Frank Hettinger, Jr., v. H. P. Beiler.

1. BUILDING CONTRACTS—*What is Not an Acceptance.*—Where a person having a house constructed, moved in before it was finished, the mere fact of his occupancy, not to the exclusion of the contractors, is not to be held against him as conclusive evidence of his satisfaction with and acceptance of the work to be performed, either by the contractors or the architect and superintendent.

2. SAME—*Acceptance a Question of Fact.*—Whether there is an acceptance of the work or not, is a question for the jury.

3. PRACTICE—*Right to Open a Case.*—The right to open a case to the jury is established by immemorial usage, and is universally recognized under our system of jurisprudence, in all cases, at least, of unliquidated damages.

4. SAME—*Opening Statements—Discretion of the Court.*—The discretion of the court as to the scope of the opening statements by counsel, either in point of time or relevancy, will not be interfered with on

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review, except in cases of arbitrariness amounting to abuse, but such discretion can not extend to a denial of the right.

5. *SAME—Statements—When Not Waived.*—The fact that the defendant did not make his opening statement before the evidence of the plaintiff was begun, is no waiver of his right to make a statement of his case to the jury, especially as the suit was begun before a justice of the peace and was not based on any pleadings.

6. *SAME—The Defendant May Reserve His Opening Statement to the Close of the Plaintiff's Evidence.*—While it is not uncommon for the defendant to follow the plaintiff with his opening, so as to have a statement of both the case that is expected to be made out, and of the defense thereto, before the jury, in advance of taking any evidence, such a course is not obligatory upon the defendant. He may, if the plaintiff has made an opening statement, reserve his to the close of the plaintiff's evidence.

Memorandum.—Assumpsit, originally brought before a justice of the peace. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed June 4, 1894.

The opinion states the case.

EASTMAN & SCHUMACHER, attorneys for appellant.

KISTLER & JOSLYN, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

As stated by counsel for appellant, the errors relied on in this appeal arise upon the rulings of the court with reference to the introduction of evidence, the refusal of the court to permit appellant's counsel to make an opening statement to the jury, and the refusal of the court to permit appellant's counsel to examine his witnesses.

The suit, originally begun before a justice of the peace, and brought to trial in the Superior Court under the provisions of the short cause calendar act, was to recover for services rendered by the appellee, as an architect, under a contract with the appellant to prepare plans and specifications, and superintend the construction of a house.

The defense was that the appellee had failed to perform the contract, whereby the appellant had suffered damages which he sought to recoup against appellee's claim.

During the examination of the appellant as a witness, it appeared that he moved into and occupied a part of the house before it was completed, and upon the theory that by having done so he accepted the work, offered evidence of a substantial and material kind, affecting the question of the performance by appellee of his contract, was excluded by the court.

The architect was not the contractor, also, for the work, but his duty under his contract was to superintend the work done by the contractors, see that it was all done, and done properly, and when done to issue the usual architect's certificates.

As tending to show failure to perform by the appellee, the plans and specifications prepared by the appellee were offered in evidence, and the failure of various contractors to whom the appellee had issued final certificates, to do their work in accordance therewith, was offered to be shown, but upon the theory that the work had been accepted by the appellant, all such evidence was objected to and excluded. The only evidence that tended to show an acceptance of the work by the appellant consisted in the fact that he had moved into the house.

In opposition to a conclusion of acceptance by such action, the appellant testified explicitly that he never did accept the house as a completed one.

The house as constructed belonged to the appellant; he moved in before it was finished, and the mere fact of his occupancy, not to the exclusion of the contractors, should not be held against him, as conclusive of his satisfaction with, and acceptance of, the work to be performed either by the contractors or the architect and superintendent.

It was at least a question for the jury whether there was an acceptance or not. *Estep v. Fenton*, 65 Ill. 457.

In the absence of anything more conclusive upon the question of acceptance, we think that, at least, the offered evidence referred to, and some other evidence offered in the same line, was erroneously excluded.

Another alleged error arises out of the court's refusal

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to permit the appellant to make an opening statement to the jury.

After the plaintiff had rested his case, counsel for the defendant, the appellant here, began a statement to the jury, and was interrupted, as follows:

Mr. Schumacher (attorney for defendant): May it please the court and gentlemen of the jury, our defense in this case is this: That Mr. Beiler, the plaintiff in this case, agreed to act as architect for the building at 147 Illinois street—

Mr. Kistler (attorney for plaintiff): It seems to me that this is a case in which we waived the opening.

The Court: I believe there was no opening. If you say, in a word, what your defense is, I will hear you.

Mr. Schumacher: I wish to make an opening statement to the jury.

Mr. Kistler: I object. He had a right and waived it.

The Court: Call your witness.

Mr. Schumacher: I would like to have a ruling.

The Court: I have ruled. You can make no opening statement to the jury.

To which ruling of the court the defendant then and there duly excepted.

The right to open a case to the jury is established by immemorial usage, and is universally recognized under our system of jurisprudence, in all cases, at least, of unliquidated damages. See Sec. 76 to 1 Greenleaf on Evidence, and cases cited in note 4.

Numerous cases in this State recognize the right, in their discussions of which party has the right to the opening and closing in particular cases, and the effect of an erroneous ruling thereon. *Edward v. Hushing*, 31 Ill. App. 223; *R. Co. v. Bryan*, 90 Ill. 126; *Kells v. Davis*, 57 Ill. 126; *Huddle v. Martin*, 54 Ill. 261; *Carpenter v. First Nat. Bk.*, 119 Ill. 353; *Rigg v. Wilton*, 13 Ill. 15.

The discretion of the court as to the scope of the opening statements by counsel, either in point of time or relevancy, will not be interfered with on review except in rare cases of arbitrariness amounting to abuse, but it would not seem

that such discretion can extend to a denial of the right altogether. *Ayrault v. Chamberlain*, 33 Barb. 229; *Scripps v. Reilly*, 35 Mich. 371; 1 Thompson on Trials, Sec. 266; 3 Chitty's General Practice, 878, *et seq.*

It seems to be conceded by the arguments on both sides, that no opening statement was made by the plaintiff. The fact that the defendant did not make his opening before the evidence of the plaintiff was begun, was no waiver of his right to make a statement of his case to the jury. The suit was begun before a justice of the peace and was not based on any pleadings.

Without any opening statement by the plaintiff, there was nothing, until after the plaintiff's evidence was in, upon which the defendant could base a statement of what the defense was, and it was as to his defense that his statement must in the main be confined.

While it is not uncommon for the defendant to follow the plaintiff with his opening, so as to have a statement of both the case that is expected to be made out and of the defense thereto, before the jury, in advance of taking any evidence, such a course is not obligatory upon the defendant. He may, if the plaintiff has made an opening statement, reserve his to the close of the plaintiff's evidence.

But where the plaintiff makes no opening statement, and where there are no pleadings, it would be absurd for the defendant to make a statement of his defense before the plaintiff's evidence had been heard, and it is opposed to all reason to argue that he waived his right to make an opening at all, because he did not insist upon making it in advance under such circumstances.

The authorities with reference to the time when the opening statement of the defendant is to be made, are all, as a matter of right, in favor of it being done at the close of the plaintiff's case.

"Regularly the defendant's opening statement is not made until the evidence for the plaintiff has been heard and the plaintiff has rested. He then introduces his case by an opening statement." 1 Thompson on Trials, Sec. 270.

"When the plaintiff's counsel have closed the evidence in

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support of the opening speech, the leading counsel for the defendant in his turn is to address the jury." 3 Chitty's Gen. Practice, 903.

With reference to the complaint that the appellant was cut off from his right to a full examination of his witnesses, we will only remark that there does not appear to have been such an abuse of the duty and power of the trial court to expedite and regulate the trial, as to warrant a review of the proceedings in that regard.

The inducements to counsel for the defense to unnecessarily prolong the trial are frequently very powerful, and a judge, mindful of his duty and dignity, must be accorded very great liberty to check any undue tendency in that regard which may appear to him.

On the other hand, the duty of the court to expedite business, should never extend so far as to amount to deprivation of a right.

It was not intended that the enactment of the short cause calendar act should operate oppressively, and the party who causes a suit to be placed on the calendar under the provisions of that act, when it is apparent from the nature of the suit that a fair hearing can not be had within the hour, should be held, in the practical administration of the act, to equally as strict accountability for imposition on the court, as his adversary who may seem to subvert the intent of the act by unduly tardy methods in presenting his side of the case.

It must be an extreme case when a court of review will interfere with a discretion of the trial court in such a matter. For the errors indicated the judgment of the Superior Court will be reversed and the cause remanded.

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**Michael C. McDonald v. Silas F. Miller, Intervening
Petitioner.**

1. RECEIVER—*Equity Jurisdiction Does Not Extend Beyond a Sale of the Assets.*—The jurisdiction of a court of equity under whose order, a receiver, appointed upon a creditor's bill, makes sale of the debtor's

assets, does not extend to the enforcement of engagements made by a purchaser, for the subsequent protection or use of the property bought at such sale.

2. **EQUITY JURISDICTION—Over a Purchaser at a Receiver's Sale.**—The fact that the purchaser at a receiver's sale is also the complainant in the suit, does not serve to retain jurisdiction over him as a purchaser, with reference to his subsequent conduct of the business, or with third persons, he having performed his contract of purchase and received possession of the property.

3. **RECEIVER'S SALE—When a Creditor Purchases.**—As a purchaser at a receiver's sale, a creditor takes the title to the property bought by him, the same as he would have done if he had been a stranger to the suit.

Memorandum.—Creditor's bill, etc. Appeal from the Circuit Court of Cook County; the Hon. SAMUEL P. McCONNELL, Judge, presiding. Heard in this court at the March term, 1894, and reversed. Opinion filed June 4, 1894.

The opinion states the case.

Knight & Brown, attorneys for appellant.

Paddock, Wright & Billings, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

A receiver of The Daily Globe Publishing Company, a corporation, was appointed under a creditor's bill, brought by the appellant upon a judgment for \$109,697.98, recovered by him at law against said corporation, and the receiver was ordered to continue the business of the corporation. The appellant alleged in his bill the insolvency of the corporation, but that it owns property, consisting of machinery, tools, etc., and a leasehold interest in the premises, Nos. 116 and 118 Fifth avenue, Chicago, and that all of said tools, machinery, stock on hand and leasehold interest, when taken together, constitute a plant for the publishing of a daily newspaper.

Shortly after his appointment, and on April 5, 1893, the receiver filed his petition, setting forth that the lease under which the corporation was in possession of the premises Nos. 116 and 118 Fifth avenue, Chicago, would expire on

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the 30th day of that month; that the business of the corporation was being carried on in said premises, and that in order to continue the business it was necessary that a new lease of said premises be entered into.

And thereupon, on the day of the filing of said receiver's petition, the Circuit Court entered an order directing the receiver "to obtain and execute as lessee, as such receiver, in the name of The Globe Publishing Company, a lease of the premises Nos. 116 and 118 Fifth avenue, Chicago, Cook county, Illinois, in the usual form, from the first day of May, 1893, until the 30th day of April, 1895, for the aggregate rental of twelve thousand dollars, payable in monthly installments of five hundred dollars each, unless objections be filed in three days."

No objections being interposed, the receiver did, on April 8, 1893, make a lease with the appellee.

The lease that was executed ran from the appellee, by his agents, as party of the first part, to "The Daily Globe Publishing Company, party of the second part," and was signed by or for the appellee, and by "The Daily Globe Publishing Company, by Harry Wilkinson, receiver."

The premises described in the lease constitute less than the whole of the premises mentioned in the order empowering the receiver to make a lease, but no point is made on that score.

In addition to the usual covenants, the lease contained the following :

"Said second party shall have the right to sublet part of said premises for the purposes of legitimate business, and said second party shall have the right to assign this lease upon the written consent of said first party, and said first party agrees that he will give his written consent at any time during the term herein granted, upon application of said second party, and for legitimate business purposes, said second party to remain liable for the performance of the conditions of this lease."

It was subsequently made to appear to the court that the best interest of the estate required that the receiver should

sell the assets, and on August 31, 1893, an order was entered directing the receiver to sell at public auction "the entire plant, tools, machinery, stock on hand, office fixtures and good will" of the corporation, and that the appellant might apply on account of any bid made by him therefor, the amount of his said judgment against the corporation and the amount of money loaned by him to the receiver.

Some objections to the order of sale, which, however, were subsequently overruled, having been interposed by one or more intervening petitioners, who sought to attack the *bona fide* character of the indebtedness and judgment upon which appellant had filed said creditor's bill, the order of sale was, on September 8th, so far modified as to require the appellant, in case he should become a purchaser at the sale, to give such bond as the court might fix, conditioned to pay to the receiver the amount of his bid, or the excess of such bid over and above the amount for which his said judgment should be held to be valid.

In pursuance of the order of sale, the receiver duly advertised, and on September 15th sold the property specified in the order of sale, to the appellant, for the sum of \$20,000; and on September 28th, the receiver reported the sale, and that appellant had executed the bond required by the modifying part of the order of sale, and brought the bond into court, which report and bond were duly approved on September 30th.

On October 14, 1893, leave was given to the appellee to intervene in said cause, and he thereupon filed his petition, setting forth the execution of the lease aforesaid, and that rent for the months of August, September and October was in arrears and unpaid, and praying that the receiver be ordered to pay said arrears of rent.

To that petition the receiver answered admitting that the rent was in arrears, but claimed that by reason of the sale on September 15th, and his delivery of possession to the appellant, he was relieved from all obligation to pay rent after that date.

Thereupon the court ordered the receiver to pay the rent

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up to and including September 15th, without prejudice to the right of appellee to renew his motion against either the receiver or the appellant for any balance of rent claimed by appellee.

On December 15th appellee again called up his petition, and obtained a rule against appellant to show cause why he should not pay rent under said lease.

To that rule appellant made answer and set up that he purchased, at the sale by the receiver, certain personal property belonging to the estate of said corporation; that he immediately took possession of the same and occupied the premises wherein the property was located, being the premises for which rent was claimed, until on or about October 24, 1893, when he sold all of said property and delivered possession thereof to the purchasers, and that he has not since said October 24th controlled, occupied, used or received the beneficial enjoyment of said premises, and prayed that the rule against him be discharged. The cause coming on to be heard upon the petition of appellee, the answer of appellant, and sundry affidavits read on both sides, it was ordered that appellant pay to appellee the sum of \$1,750 as rent for the last half of September and the months of October, November and December, 1893.

This appeal calls in question the order against appellant to pay said \$1,750. Nothing that is contained in the affidavits affects the question that is raised by the pleadings and order.

We are unable to discover from the record any theory upon which the order complained of may be justified.

The jurisdiction of a court of equity under whose orders a receiver appointed upon a creditor's bill, makes sale of the debtors' assets, does not extend to the enforcement of engagements made by a purchaser at such sale, for the subsequent protection or use of the property bought at such sale.

The fact that the purchaser is also the complainant in the bill does not serve to retain jurisdiction over him as a purchaser with reference to his subsequent conduct of the business, or with third persons, he having performed his

contract of purchase and received possession of the property. The court held that appellant, as a purchaser, gave to respond to the receiver in case his judgment should be held invalid, was not for appellee's benefit in any way, until, at least, the said judgment shall have been successfully impeached.

Whether the rent for which the receiver engaged, under the lease, was a charge upon the assets of the estate that came to the receiver's hands is not a question here, for nothing in that regard is now asked of the receiver.

Neither does it matter whether the "plant" of the newspaper corporation that was sold to appellant, included the lease. In the event that it was so included, and thereby the appellant became the assignee of the lease, the remedy of appellee for the recovery of rent under the lease must be found elsewhere than in this suit; and so, also, if appellee's remedy is for use and occupation of the premises.

As a purchaser at the receiver's sale, the appellant took the title to the property bought by him exactly the same as he would have done if he had been a stranger to the suit; and the court that ordered the sale lost all jurisdiction over him as a purchaser and over the subject-matter of the purchase, as soon as he completed his purchase, took possession of the property, and the court had approved the sale.

If this suit might be kept open for the enforcement of the rent ordered to be paid by the appellant, it could with equal propriety be resorted to for all future accruing rent.

We have no concern with the remedy that appellee may have, either against the appellant, as assignee of the lease, or upon an independent obligation, or against the receiver, under the lease, for neither of such questions are before us.

When the property was, by the receiver's sale, converted into money, or its equivalent, whatever claims may have existed as a charge against the assets of the estate, could only be asserted against the receiver.

The Circuit Court had full jurisdiction to entertain such claims and do exact justice with reference to them, but it had no jurisdiction to settle disputes between the purchaser of the property of the estate and a third party, growing out of subsequent dealing with the property.

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There is no question in this record as to the duty of the court to prevent its receiver from repudiating his contract obligations.

The only question is, may the court follow up a purchaser at its receiver's sale, and enforce against him an express or implied undertaking entered into by him, as such purchaser, with a third party subsequent to the purchase? In so doing we think the Circuit Court exceeded its jurisdiction.

Holding as we do, that there is no liability of the appellant to the appellee in this proceeding, the order of the Circuit Court will be reversed, without remanding the cause.

John B. Lyon v. John J. Bryant.

1. **RECOUPMENT—*Indispensable Elements.***—It is an indispensable element in the doctrine of recoupment that the demand sued for, and that to be recouped, shall arise out of the same subject-matter. In its modern application, the foundation of recoupment is failure of consideration.

2. **SAME—*When the Rule Does Not Apply.***—B. was the indorsee, before maturity, of a promissory note made by L. In an action brought upon it, L. claimed that B. had slandered him by stating that he had conveyed away all his property for the purpose of defrauding his creditors. *It was held*, the doctrine did not apply.

Memorandum.—Assumpsit on a promissory note. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed July 2, 1894.

APPELLANT'S BRIEF, LEE & HAY, ATTORNEYS.

Recoupment is contradistinguished from set-off in three essential particulars:

1. In being confined to matters arising out of, and connected with, the transaction or contract upon which the suit is brought.

2. In having no regard to whether such matters are liquidated or unliquidated.

3. That the judgment is not the subject of statutory regulation, but controlled by the rule of the common law. *Ward v. Fellers*, 3 Mich. 281; *Myers v. Estell*, 47 Miss. 4; *Stow v. Yarwood*, 14 Ill. 424; *Brigham v. Hawley*, 17 Ill. 38; *Streeter v. Streeter*, 43 Ill. 155; *Scott v. Kenton*, 81 Ill. 96.

Damages for a tort may be recouped against a claim originating in contract. *Stow v. Yarwood*, 14 Ill. 424; *Brigham v. Hawley*, 17 Ill. 38; *Streeter v. Streeter*, 43 Ill. 155; *Scott v. Kenton*, 81 Ill. 96.

It is essential only that the tort should be in relation to the same subject-matter. *Scott v. Kenton*, 81 Ill. 96; *Brigham v. Hawley*, 17 Ill. 38; *Streeter v. Streeter*, 43 Ill. 155.

Recoupment may be made as a defense to a promissory note. *McDowell v. Milroy*, 69 Ill. 498; *Waterman v. Clark*, 76 Ill. 428. And is admissible under the general issue. *Turner v. Retter*, 58 Ill. 264; *Wadham v. Swan*, 109 Ill. 46.

APPELLEE'S BRIEF, CAMPBELL & CUSTER, ATTORNEYS.

The doctrine of recoupment, as laid down by the Supreme Court of this State, applies only to mutual claims arising out of the same subject-matter, and susceptible of adjustment in one action. *Stow v. Yarwood*, 14 Ill. 424; *Brigham v. Hawley*, 17 Ill. 38; *Streeter v. Streeter*, 43 Ill. 155; *Scott v. Kenton*, 81 Ill. 96.

To be the subject of recoupment the defendant's claim must arise out of the cause of action involved in the plaintiff's suit. *Hubbard v. Rogers*, 64 Ill. 434; *Evans v. Hughey*, 76 Ill. 115.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee is the indorsee before maturity of a promissory note made by appellant for \$3,250, dated May 9, 1893, and payable ninety days after date, with six per cent interest, and, as such, brought suit, and recovered judgment against the appellant for the amount of the note and interest. The only plea was the general issue.

The defendant, appellant, offered, as stated in appellant's

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brief, to prove that, "at a time when the appellee was the owner of the note, he had a conversation with Mr. A. S. Lowenthal, concerning the note and its payment, Mr. Lowenthal having called upon him to make arrangements to that end. In that conversation the appellee, then being the owner of the note, slandered the appellant, by stating that he (appellant) had conveyed away all his property for the purpose of defrauding his creditors. The appellant made an offer of evidence to prove the above slander in recoupment of the appellee's demand upon the promissory note. This evidence the trial court refused to admit. In this the trial court erred, and we now present the question to this court for adjudication."

No other defense was offered. The offered evidence was properly refused. In *Keegan v. Kinnare*, 123 Ill. 280, it is said: "It is an indispensable element in the doctrine of recoupment that the demand sued for and that recouped shall arise out of the same subject-matter. *Stow v. Yarwood et al.*, 14 Ill. 424; *Streeter v. Streeter*, 43 Id. 155; *Waterman v. Clark et al.*, 76 Id. 428. Freeman, in his notes to *Van Epps v. Harrison*, 40 Am. Dec. 323, says (and we quote because, we think, accurately): 'In its modern application, the foundation of recoupment is failure of consideration. The defendant, in effect, admits his failure to perform the contract upon which he is sued, and seeks to extenuate his default by showing that the plaintiff has failed, in some particular, to do that which was the consideration of the defendant's promise, and to that extent, therefore, the plaintiff has no right to hold the defendant liable; hence, it is essential that the wrong of which the defendant complains should, in some way, impair the consideration of his contract; in other words, it must appear that the express or implied promise broken by the plaintiff was the consideration for the defendant's promise.' See, also, *Christy v. Ogle's Exrs.*, 33 Ill. 295. Illustrative of the principle, it has been held that in an action by a laborer for his wages, the employer can not recoup damages for an injury done by the plaintiff outside the scope of his employment. *Nashville Railroad Co. v.*

Chumley, 6 Heisk. 327. In an action by a landlord to recover rent, the tenant can not recoup damages for a trespass committed by the landlord, which does not amount to a breach of the covenant of quiet enjoyment. Cram v. Dresser, 2 Sandf. 120; Edgerton v. Page, 20 N. Y. 281; Bartlett v. Farrington, 120 Mass. 234; Huline v. Brown, 3 Heisk. 679. In an action by a vendor of land for the purchase money, the purchaser can not recoup the damages sustained by him by reason of the vendor's subsequently entering and taking the crops. Slayback v. Jones, 9 Ind. 470. Damages for maliciously suing out an attachment in a suit, have been held not to be subject to recoupment in the same suit, because the wrong was in no way connected with the consideration of the contract sued on, but was an independent tort. Nolle v. Thompson, 3 Metc. 121; Freeman's note, *supra*."

See also Brigham v. Hawley, 17 Ill. 38; Scott v. Kenton, 81 Ill. 96; Hubbard v. Rogers, 64 Ill. 434; Evans v. Hughey, 76 Ill. 115; McDowell v. Gilroy, 69 Ill. 948.

The judgment of the Circuit Court will be affirmed.

Montana Columbian Club v. Ketcham, Rotschild & Co.

1. SHERIFF'S RETURN—*How Questioned*.—The truth of the sheriff's return can not be questioned by motion. It must be done by plea in abatement.

Memorandum.—Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed June 18, 1894.

STATEMENT OF THE CASE.

On the 20th day of September, 1893, a judgment by default was rendered against appellant, a corporation organized under the laws of this State, for the sum of \$516.75. On the 28th day of September, at the same term, appellant specially appeared and moved the court to quash the sum-

Montana Club v. Ketcham, Rotschild & Co.

mons and to vacate the judgment entered by default. The sheriff asked leave to amend his return on the summons. His motion was in the following words :

“ And now comes James H. Gilbert, sheriff of said Cook county, and moves the court for leave to amend the return made by said sheriff on the summons in the above entitled cause, by making such return read as follows, according to the facts: ‘ Served this writ on the within named defendant, Montana Columbian Club, by delivering a copy thereof to R. B. Duncan, manager and general agent of said defendant, Montana Columbian Club, on the 8th day of September, A. D. 1893, the president or any clerk or secretary or superintendent of said defendant, Montana Columbian Club, not found in my county.’ ”

In support of his motion he filed the following affidavit :

“ On the 8th day of September, A. D. 1893, I duly served the writ of summons upon said defendant, the Montana Columbian Club, by delivering a copy thereof to R. B. Duncan, who is the manager, and who had sole charge and control of said club, the president of said club not being found in my county. In making the return of the service I inadvertently wrote the name ‘ California ’ instead of ‘ Montana.’ ”

In support of its motion to quash the summons and to set aside the default and judgment, appellant read the affidavit of Fred L. Brooks, who states that he is the secretary of the Montana Columbian Club; that T. S. Corrigan is the treasurer and that they both reside in the city of Chicago and county of Cook, and were in the said city and county at the time of the service of the summons in this case, and that Robert B. Duncan “ is not now and never has been an officer or agent of said company, but merely an employe at said club house.”

Appellant also filed and read the affidavit of Robert B. Duncan in support of its motion. Duncan swears in his affidavit that he was employed by the Montana Columbian Club, and that his duties confine him in and about the rooms of said club building; that he told the deputy sheriff, when he called at the club house to serve the summons, that “ he

was only an employe of said company and could not accept service, and then and there informed said sheriff where the officers of said club could be found."

Upon the reading of the affidavits the court granted leave to the sheriff to amend his return, and overruled the motion of appellant to quash the summons and to set aside and vacate the default and judgment. The sheriff then amended his return on the summons to read as follows:

"Served this writ on the within-named defendant, Montana Columbian Club, by delivering a copy thereof to R. B. Duncan, the agent of said club, on the 8th day of September, 1893. The president of said club not found in my county."

G. W. & J. T. KRETZINGER, attorneys for appellant.

NEWMAN & NORTHRUP, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The deputy sheriff served the summons against the appellant by delivering a copy "to R. B. Duncan, the agent of said club."

The appellant filed affidavits that Duncan was not "agent," and stating who the officers of the club were, and where they might have been found, and moved to vacate a judgment by default which had been entered, and quash the summons. Inadvertently the name California had been used for Montana in the original return and the court permitted a correction by amendment of the return.

The truth of the sheriff's return can not be questioned by motion. It must be done by plea in abatement. *Union Nat. Bk. v. First Nat. Bk.*, 90 Ill. 56.

No application for leave to plead was made, and the judgment is affirmed.

Alfred Harley v. The Sanitary District of Chicago.

54 337
58 310

1. SPECIFIC PERFORMANCE—*Under Prayer for Relief.*—Under the prayer of general relief specific performance may be decreed if the nature of the contract permits it.

2. SAME—*Contracts Relating to Personal Property.*—Chancery will not entertain a bill to specifically enforce contracts relating to personal property; nor contracts which, by their terms, call for a succession of acts, where such performance can not be consummated by one transaction, or which require protracted supervision and direction.

3. CHANCERY PRACTICE—*Objection to the Equity of the Bill.*—Under the practice of this State objection to the equity of the bill may be made by answer.

4. SOLICITOR'S FEES—*On Dissolution of an Injunction.*—On the dissolution of an injunction solicitor's fees can only be allowed for such services as were necessary in procuring the dissolution.

Memorandum.—Bill for injunction and relief. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed July 23, 1894.

The opinion states the case.

APPELLANT'S BRIEF, JOHN J. COBURN, WM. E. MASON, LAW-
RENCE M. ENNIS, GEO. W. BROWN AND CLARK
JAMES TISDEL, ATTORNEYS.

The allowance for solicitors' fees upon the assessment of damages upon dissolution, must be confined to services necessary to the dissolution. *Alexander v. Colcord*, 85 Ill. 328; *McQuown v. Law*, 18 Ill. App. 34; *Gerard v. Gateau*, 15 Ill. App. 520; *Field v. Meddenwald*, 26 Ill. App. 642.

APPELLEE'S BRIEF, ORRIN N. CARTER, GEORGE E. DAWSON,
AND COLLINS, GOODRICH, DARROW &
VINCENT, ATTORNEYS.

Injunctions, the effect of which is to interfere with or suspend the operations of important public works, should be granted only for the prevention of irreparable mischief. *High on Injunc.*, Secs. 615, 833, 1185; *Story's Ex. Juris.*,

Sec. 459; Barton v. Wolf, 108 Ill. 195; Pierce v. Plumb, 74 Ill. 326.

Equity will not decree specific performance of a contract relating to personal property unless there is some element in it to show that the relief at law may not be adequate. Sohn v. Mitchell, 115 Ill. 124.

A court of equity will not enforce specifically a contract which provides for the rendering of personal services, or for the performance of acts in the future requiring supervision and direction. Blanchard v. Railroad Co., 31 Mich. 43; Kidd v. McGinnis, 48 N. W. Rep. 221; 2 High on Injunc., Secs. 1107, 1109, 1121, 1162; 3 Pomeroy, Eq. Juris., 2d Ed., Sec. 1405, p. 2167, note; Grape Creek Coal Co. v. Spellman, 39 Ill. App. 630; Fargo v. N. Y. & N. E. R. R. Co., 3 Misc. N. Y. Rep. 205.

A court of equity will not enforce a contract by injunction, or sustain an injunction in relation to a contract it can not specifically enforce. Gas Co. v. Lake, 130 Ill. 60; Gelston v. Sigmund, 27 Md. 334, 343; 3 Pom. Eq. Juris., Sec. 1341; 1 Spelling Ex. Rem., Sec. 478; Leake on Contracts, pp. 968, 970; High on Injunctions, Secs. 1107, 1109.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee is a public corporation engaged by the authority of the State in opening a channel through which a portion of the water of Lake Michigan will be diverted from the Gulf of the St. Lawrence to the Gulf of Mexico.

The appellant made with the appellee a contract by which the appellant undertook to do a portion of the work, and gave a bond with security in the sum of \$100,000, conditioned for the performance of the contract on his part.

The contract provided in effect that the appellee might take the work from the appellant upon the happening of contingencies which the appellee claimed had happened, and therefore did take the work from the appellant. Thereupon the appellant filed this bill for an account as to so much as the appellant had done under his contract, and damages for the wrong done him, and an injunction to pre-

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vent the appellee from interfering with his "possession and contract of said work or his prosecuting the same, from re-letting the same, or any part thereof," and other relief.

The bill does not in terms pray a specific performance of the contract, but under the prayer of general relief, such performance might be enforced if the nature of the contract permitted it, and an injunction as the bill prays, would necessitate such enforcement as a consequence; for if the work may not be taken from the appellant, and must be done, he must do it.

Now that such a contract can not be specifically enforced in equity is familiar law. The principle is stated in *Grape Creek Coal Co. v. Spellman*, 39 Ill. App. 630.

As is there said, "It is apparent that the damages alleged can be ascertained at law, and we see nothing to prevent the application of the general rule, that chancery will not entertain a bill to specifically enforce contracts relating to personal property, nor contracts which by their terms call for a succession of acts whose performance can not be consummated by one transaction, and which require protracted supervision and direction."

And "Where an agreement is of such a nature that it is practically impossible for a court to enforce it, and the bill for an injunction is in effect a bill for a specific performance, equity will not interfere." *High on Injunctions*, Sec. 1162.

A very elaborate case decided last year, in which is collected a great mass of authority, is *Fargo v. New York, etc., R. R.*, 23 N. Y. Supp. 360. See also, *Johnson v. Shrewsbury & Birmingham Ry.*, 3 De Gex, M. & G. 914.

Exceptions to the rule may be found in cases relating to theaters. *Kennicott v. Leavitt*, 37 Ill. App. 435; *High on Inj.*, Sec. 1164.

So of operating contracts between railroads. *South & North R. R. v. Highland Ave. R. R.*, 13 Southern Rep. 682.

There is another very important feature of this case. The appellee is a public corporation, engaged in the prosecution of a work of great public and pressing necessity.

Delay in completing it is to be deprecated. If the appellant has suffered wrong the courts of law are open to him, and better for the public it is to pay damages than have the work delayed. High on Inj., Sec. 1185.

That objection to the equity of the bill may be made by answer seems to be the rule in this State. *Sachsel v. Farrar*, 35 Ill. App. 277; *Chi. Pub. Stock Exch. v. McClaughry*, 148 Ill. 372.

The decree dissolving the interlocutory injunction and dismissing the bill for want of equity is affirmed.

The court awarded \$1,000 to the appellee as damages, caused by the injunction.

The only evidence as to damages was the testimony of one of the attorneys, who, after stating his experience in the profession, and the services of the attorneys for the appellee, said: "I think a very low fee for the services of the attorneys in this case would be one thousand dollars." This is not enough. *Cors v. Tompkins*, 51 Ill. App. 315.

Only reasonable solicitors' fees paid, or agreed to be paid, by the appellee for services rendered in procuring the dissolution of the injunction, can be recovered. *Lawrence v. Trainor*, 136 Ill. 474. And such only as are usual and customary. *Zibell v. Barrett*, 30 Ill. App. 112.

A motion to dissolve for want of equity on the face of the bill would seem to have been all that was necessary; the answer and affidavits seem to be superfluous, and, if so, are not to be considered in awarding damages. *Hayes v. Chi. & N. W. S. & G. Co.*, 37 Ill. App. 19.

Since the case last cited was decided, the Supreme Court, in *Lawrence v. Trainor*, 136 Ill. 474, has set the example of dividing the costs, which example we follow, and direct that each party pay one-half of the costs of this court.

Decree affirmed as to the principal case; and as to damages reversed and remanded.

Gottschalk v. Smith.

Henry Gottschalk v. Samuel Smith.

1. **COMMON COUNTS**—*What is Recoverable Under Them.*—When the terms of a special contract have been so far performed that nothing remains but a debt or duty to pay money, the amount due may be recovered under a general count.

2. **MONEY HAD AND RECEIVED**—*The Action for, When it Lies.*—The action for money had and received may be maintained, whenever the defendant has obtained money of the plaintiff, which in equity and conscience he had no right to retain.

3. **SPECIAL CONTRACT**—*Under the Common Counts.*—However special the contract is, if not under seal, and the plaintiff has performed it, and the defendant received under it the benefit for his own use, an appropriate common count will be sufficient as a declaration.

4. **PARTNERSHIP**—*When it Does Not Exist.*—Where a transaction engaged in is but a single adventure, in which there is no property and no element of loss, the elements necessary to constitute a partnership in the legal sense of that term are wholly lacking.

Memorandum.—Assumpsit. Common counts. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed June 4, 1894.

APPELLANT'S BRIEF, LACKNER & BUTZ, ATTORNEYS.

Where two or more parties agree together to purchase lands, taking the title thereto in the name of one of said parties, and that they will each use their best efforts to sell said lands, and will divide equally the profits arising from such sale, said agreement creates the relation of partnership between the parties, and the profits derived from such sales are partnership funds. *Winstanley v. Gleyre*, 146 Ill. 27; *Roby v. Colehour*, 135 Ill. 300; *Boone v. Clark*, 129 Ill. 488; *Merrill v. Colehour*, 82 Ill. 626.

One partner can not sue another at law for any matter relating to the partnership concerns, unless there has been a final settlement between them, a balance ascertained, and an express promise to pay such balance. *Davenport v. Gear*, 2 Scammon 495; *Chadsey v. Harrison*, 11 Ill. 156; *Burns v. Nottingham*, 60 Ill. 532.

54	341
59	28
59	399
156	377
54	341
64	622
54	341
70	73
54	341
85	450

APPELLEE'S BRIEF, ST. JOHN, FRENCH & MERRIAM,
ATTORNEYS.

So long as the contract continues executory, the plaintiff must declare specially, but when it has been executed on his part and nothing remains but payment in money by the defendant, which is nothing more than the law would imply against him, the plaintiff may declare generally, using the common counts, or he may declare specially on the original contract, at his election. Greenleaf on Evidence, Sec. 104.

The joining of two or more persons in a single adventure in which the profits are to be equally divided does not constitute them partners in such a sense as will oust a court of law of its jurisdiction. *Fawcett et al. v. Osborn et al.*, 32 Ill. 411; *Snell v. DeLand*, 43 Ill. 323; *Adams v. Funk*, 53 Ill. 219; *Hawley v. Walton*, Admr., 63 Ill. 260.

If the partnership business consists of a single venture or transaction, which is closed up and finished, and there are no accounts with third persons to adjust or debts to be provided for, the action at law may be maintained for an adjustment of the partnership affairs, though no final balance has been struck. *Clark v. Miller*, 36 Kan. 393; *Frye, executor, etc., v. Potter*, 12 R. I. 542; *Williams v. Henshaw*, Pick. 79; *Wheeler v. Wheeler*, 111 Mass. 247; *Wright v. Crunisty*, 41 Pa. St. 102.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was a suit to recover one-half of the profit realized by the appellant in negotiating the sale of 147 acres of land in Cook county.

The profit made was \$30 per acre, or \$4,410, and the court below, to whom the cause was submitted without a jury, gave judgment in favor of appellee for one-half of that amount, and from that judgment this appeal is prosecuted.

It would serve no useful purpose to review and analyze the conflicting evidence of the parties to the suit as to what their agreement was.

The appellant, who was defendant below, moved the court to exclude all the plaintiff's evidence tending to show that the defendant promised to pay the plaintiff one-half of the profit arising out of the sale of the land, on the ground that the evidence was inadmissible under the declaration, which motion was overruled.

The declaration consisted of the common counts, including one for money had and received.

The agreement of the parties related to but a single transaction and that had been fully executed. Nothing remained to be done except to pay over the money, and in such a case an action for money had and received is the proper remedy. *Tunnison v. Field*, 21 Ill. 108; *Pickard v. Bates*, '38 Ill. 40; *Elder v. Hood*, 38 Ill. 533.

"It is a familiar rule that when the terms of a special contract have been so far performed that nothing remains but a mere debt or duty to pay money, then the amount due may be recovered under a general count." 1 Chitty Pl. Note f, p. 350.

"It is the well recognized doctrine, that the action for money had and received may be maintained, whenever the defendant has obtained money of the plaintiff, which in equity and conscience he has no right to retain." *Taylor v. Taylor*, 20 Ill. 650.

"However special the contract, not under seal, if the plaintiff has performed it, and the defendant received under it the benefit for his own use, in general some common count will suffice." *Zjednoczenie v. Sadecki*, 41 Ill. App. 329.

The evidence not only tended to prove, but we think, with the court below, that it did prove the existence of an agreement between the parties to exert themselves together, and separately, to procure a sale of the land at a price in excess of what the owner was willing to take, and to divide the profit equally; that the land was sold and the profit received by the defendant, and that he refused to pay over to the plaintiff the one-half thereof, which amounted to the sum for which judgment was rendered.

The motion of the defendant was, therefore, most properly overruled. *Railway Co. v. Velie*, 140 Ill. 59; *Palmer v. Johnson*, 84 Ill. 269; *Lawrence v. Ins. Co.*, 5 Ill. App. 280.

Evidence was offered by appellant, in order to prove that the purchase of the land by the railroad company to whom it was sold came about through the intervention of the appellant alone, and without the aid or suggestion of appellee, which offered evidence was excluded by the court.

We think the court ruled correctly in that regard. The evidence was immaterial. There is no pretense to the contrary of the fact offered to be proved. The agreement of the parties contemplated separate services by each one in whatever direction results might be produced, and both parties did, in fact, separately and together make efforts to sell to several parties. The appellant does not claim that in the particular transaction with the final purchaser he performed any services. The venture between them was that both should exert themselves to make a sale, either together or separately, and in the resulting profit each should share. Under such an arrangement neither one could have all the profit, although his efforts were the effective cause of the result, and neither one could claim of the other an allowance for his increased labor and time spent over that given by the other.

It is argued by counsel that if any relationship whatever existed between the parties with reference to the sale of the land, it was one of partnership, and that therefore the action would not lie in the form it was brought. The agreement here contemplated nothing but a single transaction in the profit of which the parties were only jointly interested. Nothing was to be bought by the parties; they were to incur no expenses or debts; they were merely to perform a particular service with reference to a single subject, and share the profit.

The elements necessary to constitute a partnership in the legal sense of that term are wholly lacking where the transaction engaged in is but a single adventure, in which there is no property and no element of loss. *Hawley v. Walton*,

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63 Ill. 260; Fawcett v. Osborn, 32 Ill. 411; Adams v. Funk, 53 Ill. 219; Snell v. DeLand, 43 Ill. 323.

It is contended that William Gottschalk, the father of the appellant, was a party to the agreement that was made and is entitled to a one-third share of the profits, if that agreement shall be so extended as to apply to the sale of the land to the railroad company.

There is some evidence tending to show that William Gottschalk took part in the conversation between the parties, but nothing was shown that will on that account warrant us in disturbing the judgment.

The judgment will be affirmed.

Theodore Nelson and Orlando Shepard v. Emilie J. Smith, Emilie J. Smith and Chalkley J. Hambleton, Executors of the Estate of Jane A. Smith, Deceased.

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58	344

1. MISJOINDER OF PARTIES—*Plaintiffs and Defendants—Must Be Made in the Court Below.*—When the objection of a misjoinder of parties is not made in the court below, it can not be urged in the Appellate Court.

2. VARIANCE—*Objection Must Be First Made in the Court Below.*—Objection on the ground of a variance between the pleadings and the proofs must be made in apt time in the court below. It can not be made for the first time in the Appellate Court.

Memorandum.—Forcible detainer. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed June 4, 1894.

C. A. SURINE, attorney for appellants.

APPELLEES' BRIEF, BANGS, WOOD & BANGS, ATTORNEYS.

Matters in abatement, if relied upon, must appear at the earliest opportunity after service is had. Steele v. G. T. I. Ry. Co., 20 Ill. App. 366; Steele v. G. T. I. Ry. Co., 125 Ill.

388; Huftalin v. Misner, 70 Ill. 205; Byers v. City Mt. Vernon, 77 Ill. 466; Dodge v. People, 113 Ill. 491.

Objection to variance between pleadings and proof must be specifically made at the trial, that opportunity to amend may be given. Bloomington v. Tebballs, 17 Ill. App. 456; Start v. Moran, 27 Ill. App. 119; Wabash Ry. Co. v. Cable, 113 Ill. 117; Mattoon v. Fallin, 113 Ill. 215; Ladd v. Piggott, 117 Ill. 651.

Misjoinder should be taken advantage of by plea in abatement. Failing to do this the verdict cures the defect by force of the statute of amendments and jeofails. Townen v. Emmet, 41 Ill. 319; Swigart v. Weare, 37 Ill. App. 258.

Misjoinder not appearing on the face of the pleadings could be alleged and objected to on the trial by defendants, only because of its supposed appearance in the evidence; and a motion to exclude or take the evidence from the jury should make such misjoinder a specific ground for the motion; failing to do so, and giving other specific reasons for the motion, would be a waiver of all other grounds, and defendants can not be allowed to urge such misjoinder on appeal, as such ground would be of a character that could have been obviated on the trial, if thus brought to plaintiff's attention. C. P. Ry. Co. v. Nix, 137 Ill. 141; City of Mattoon v. Fallin, 113 Ill. 249.

A specific objection to the admission of evidence is strictly a waiver of all objections based on other grounds not specified, and objections to evidence being only general, no specific objection can be heard on appeal. W. W. Ry. Co. v. Friedman, 41 Ill. 275; N. Chic. Ry. Co. v. Cotton, 41 Ill. 315; L. & E. I. R. R. Co. v. People, 120 Ill. 669; T. H. & I. R. R. Co. v. Voelker, 129 Ill. 548; Weber v. Mick, 131 Ill. 520; L. S. & M. S. Ry. Co. v. Wood, 135 Ill. 516.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was a proceeding against appellants for the forcible detainer of certain premises.

Judgment having been rendered against them, appellants

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prosecute this appeal, and assign as error that there was a misjoinder of plaintiffs and also of defendants.

Appellants made no such objection in the court below, where it could easily have been obviated; they can not urge it here for the first time. *Towan v. Emmet*, 41 Ill. 319; *City of Mattoon v. Fallin*, 113 Ill. 249.

Appellants also insist that there was a variance between the complaint and the evidence introduced in support thereof. This objection is also made here for the first time. Such variance should have been pointed out upon the trial, that by proper amendment it might have been removed.

The defendants offered no evidence. A witness for the plaintiffs testified that appellant Shepard was a tenant of appellant Nelson, merely occupying a room in the premises. Shepard had himself been served with notice to quit, yet had continued to occupy, and had failed to disclaim any interest in, occupancy of, or claim to, the entire premises.

He defended against the claim of the plaintiff, that he, Shepard, was without right withholding possession of the entire premises from the landlord. The joint judgment against him and Nelson that they surrender the possession of the premises, if erroneous, is an error that does not injure him. *Reid v. Foster*, 37 Ill. App. 76; *Hair v. Barnes*, 26 Ill. App. 580.

There is no pretense that the rent was not past due, or that the plaintiffs are not justly entitled to the possession of the premises.

A joint action against Shepard and Nelson was properly brought. *Espen v. Hinchliff*, 133 Ill. 468.

The defense and the appeal are without merit and the judgment of the Circuit Court is affirmed.

The People of the State of Illinois v. The Lake Street Elevated Railroad Company.

1. **QUO WARRANTO**—*Allowance of Writ Exhausts Discretionary Power of the Court.*—When the writ of *quo warranto* has been allowed, the discretionary power of the court or judge granting it is exhausted, except when the order is made under a misapprehension of some material fact, but for which the order would not have been made.

2. **SAME**—*When Granted Under Misapprehension of Facts.*—Where the writ has been granted under a misapprehension of facts it is competent for the court to vacate the order granting it at any time during the term.

3. **SAME**—*Practice Where the Writ Has Been Properly Granted.*—Where the writ has been granted without any such misapprehension, the issues of fact and of law presented by the pleadings must be tried and determined in accordance with the rules of law in the same manner and with the same degree of strictness as in ordinary cases.

4. **SAME**—*Practice—Mode of Instituting the Pleadings.*—The mode of instituting *quo warranto* proceedings is usually for the state's attorney to submit a motion based on affidavits for leave to file an information in the nature of *quo warranto*. A rule *nisi* is made on defendant to show cause why the information should not be filed. The respondent may answer the rule by counter-affidavits.

5. **SAME**—*Leave Not Granted as a Matter of Course.*—The general rule is, that leave to file an information is not to be granted as a matter of course, but depends upon the sound discretion of the court and the circumstances of the case.

6. **SAME**—*Not a Private Remedy.*—If a wrong is done by the abuse of a franchise, it is a public wrong, and a proceeding by *quo warranto* must be had by the public prosecutor or other authorized agent of the State. A private citizen can not in such cases have the aid of this extraordinary remedy.

7. **SAME**—*Authority of Attorney-General.*—The authority of the attorney-general or state's attorney to file an information affecting public rights only, must be in his official capacity under a sense of official duty, and not merely the lending of his name for the use of a private party. The proceeding must be official in fact, and not simply official in form, but private in fact.

8. **SAME**—*Abuse of the Process.*—The Circuit Court, in the exercise of its discretion, is authorized to take into consideration the circumstances showing the character of the proceeding, and if satisfied that the purpose is merely to allow a private party to institute proceedings in a matter concerning the public alone, it is its duty to refuse to allow the information to be filed.

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9. *SAME—Statute of Limitations—Lapse of Time—Public Policy.*—After a considerable lapse of time, public policy forbids that discretionary writs like those of *quo warranto* and *certiorari* should be granted. The right to file the information should be refused on the ground of public policy where there has been such a lapse of time that a wrong would be done in granting the writ.

10. *SAME—Not a Remedy for Purpresture.*—*Quo warranto* is not a remedy for purpresture. A judgment of ouster will not take down a structure, nor can one of seizure pass the property in it to the State.

11. *CITIES AND VILLAGES—Power To Grant Use of Streets for Railroad Purposes.*—A city council has the power to grant the use of a street for railroad purposes, when, in its judgment, the public good demands it; subject, however, to the provisions of the law requiring the consent of property owners.

12. *CORPORATIONS—Ultra Vires—Waiver by State.*—Where a corporation, by the exercise of powers not conferred by its charter, does no private injury and commits an offense against the public alone, the State may punish or waive the right to do so, as in the judgment of those intrusted with the appropriate power in that respect, may be deemed most in consonance with the public interests.

13. *VACATION—Power of Judges in.*—A judge in vacation, making an order, can not, in vacation, set it aside, since in vacation the judge has no other judicial power than that given him by the statute.

14. *TERM TIME—Powers of Judges in.*—In term time, the court has generally, so long as the proceedings are *in fieri*, the power to undo anything that has been done in the case, whether by the same or by another judge.

Memorandum:—*Quo warranto* proceedings. Appeal from the Criminal Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 30, 1894.

The opinion states the case.

JACOB J. KERN, state's attorney, for appellant; RICHARD PRENDERGAST and WM. B. KEEP, of counsel.

KNIGHT & BROWN, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

With very slight additions which will follow Judge Brentano's opinion herein copied, that opinion states the facts involved in this controversy.

That opinion is as follows:

"BRENTANO, J. On the 5th inst. there was presented to

this court a petition signed by the state's attorney, Jacob J. Kern, together with the affidavits of Valentine C. Brahm, William H. Sullivan, Henry Lovi and Gustaf H. Carlson."

"The petition asked for leave to file an information in the nature of a *quo warranto* against the Lake Street Elevated Railroad Company, requiring said company to appear and show by what authority it uses and claims the franchise of laying, constructing, maintaining and operating an elevated railroad upon West Lake street and other public streets in the city of Chicago, and in support of such application, the state's attorney filed the affidavits of the parties above mentioned, and prayed the court to consider the said affidavits as part of the petition."

"The affidavits of Brahm, Lovi and Sullivan set forth and claimed that no petition of the owners of land representing more than one-half the frontage on West Lake street, between the west line of Canal street and Crawford avenue, was ever filed with the city council, consenting to the construction of an elevated railroad upon Lake street. And further, on information and belief, that the Lake Street Elevated Railway Company which secured certain ordinances on November 24, 1890, was not legally incorporated and never had any legal corporate existence."

Brahm likewise set forth that he was the owner of property known as No. 1099 West Lake street. Sullivan set forth that he was the owner of property known as 1088 West Lake street.

"The affidavit of Lovi set forth that he was a resident of Hinsdale, and was the owner of land fronting on West Lake street on the line of the elevated railroad."

"The affidavit of Brahm, Sullivan and Lovi do not appear to have been made upon any personal examination or inspection of the records concerning the matters to which they make affidavit."

"The affidavit of Gustaf H. Carlson, also filed as aforesaid, sets forth more in detail the reason why he claimed there was not sufficient frontage at the time of the passage of the ordinances of November 24, 1890, hereinafter referred to.

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“Based upon these documents so filed, the court on October 5, 1893, permitted the information to be filed in the nature of a *quo warranto*.”

“The information set forth that the Lake Street Elevated Railroad Company, respondent, is using, without warrant, the franchise of building an elevated railroad upon Lake street, and other public streets, and avers that the railroad company claims that its powers are acquired and derived through certain ordinances passed by the city council of the city of Chicago, and through certain transfer and assignments from a pretended corporation known as the Lake Street Elevated Railway Company; and avers that the railway company was not legally incorporated, for the reason that it was incorporated under an act, entitled, An act concerning corporations, in force July 1, 1872. And that on the 24th of November, 1890, the railway company secured an ordinance to build an elevated railroad upon Lake street, from the west line of Canal street to Crawford avenue, and also on the same date secured the passage of another ordinance, extending the line from Crawford avenue to the city limits, and eastward from Canal street to Market street.”

“The ordinances as mentioned are set forth in full in the information.”

It sets forth the incorporation of the city, under the act providing for the incorporation of cities and villages, approved April 10, 1872, and the provision of the charter, requiring the petition of the owners of land before the city council shall have the right to grant an ordinance to build an elevated railroad along and upon a public street; and avers that no such consent was given as required by the charter by the owners of property upon Lake street. That, an act passed in 1883, in force July 1, 1883, required the consent of property owners in order to authorize the city council to grant permission to build an elevated railroad on a public street; and then avers that there was no such petition presented as required by law, and for that reason the ordinances of November 24, 1890, were utterly invalid.

“That in 1892, the Lake Street Elevated Railroad Com-

pany was incorporated under the act in force March 1, 1872, known as Chapter 114 of the Revised Statutes, and that on the 30th of August, 1892, the railway company assigned and transferred to the railroad company all its rights to the ordinances of November 24, 1890; and afterward, on the 19th of December, 1892, the city council passed an ordinance consenting to, and confirming the transfer from one company to the other."

"That the ordinance of November 24, 1890, authorizing the construction of the road from Canal street to Crawford avenue, provides that if it should not be constructed within two years all rights under the ordinances should cease; avers that the railroad was not completed as required by the ordinances; avers that the railway company not having so completed the railroad, forfeited all of its pretended rights to be conferred by the ordinances of November 24, 1890; and avers that if the railway company had acquired any rights or franchise under the ordinances of 1890, all such rights were forfeited and extinguished by reason of the failure of the railway company to have the railroad built on Lake street from Canal street to Crawford avenue within two years, as required by the ordinances."

"A summons was thereupon issued to the railroad company, in form, as required by law, requiring it to answer the information the 16th of October. The writ was served upon the respondent company on the 13th of October, and on the 14th of October the company filed its demurrer to the information."

"On Monday morning, the 16th inst., on the convening of court, counsel for the respondent entered a motion to vacate the order of the court of October 5th, granting leave to file the information and to abate any further proceedings in this matter, and in support of such motion, filed a number of affidavits."

"The matter was set down for hearing on the 18th inst., and Mr. Keep and Mr. Prendergast appearing as counsel in the case, made a motion to strike from the files the affidavits filed in support of the motion of respondents, to vacate the order of October 5, 1893."

“The court, after argument of counsel, overruled the motion to strike the affidavits from the files.”

“Counsel then asked leave to file counter-affidavits to those filed by the respondent.”

“Had a rule been entered requiring the defendant to show cause why the writ should not be allowed, doubtless the matter set forth in the affidavits filed might and would have been considered.”

“It is clear, however, from the opinion of the Supreme Court in *People v. Golden Rule*, 114 Ill. p. 44, that when the writ of *quo warranto* has been allowed, the discretionary power of the court or judge granting the same is exhausted, except when the order is made under a misapprehension of some material fact, but for which the order would not have been made. In such case it is competent for the court to vacate the order at any time during the term; and where the writ has been granted without any such misapprehension ‘the issues of fact and of law presented by the pleadings must be tried and determined in accordance with the strict rules of law in the same manner and with the same degree of strictness as in ordinary cases.’”

“It is apparent from the foregoing that when such discretionary stage has been passed, and as in this case, the writ has been allowed, the motives that may have, either directly or indirectly, prompted the action, are not a proper subject of consideration. They are not material facts about which a misapprehension or want of knowledge on the part of the court or judge granting the order for the writ, could be alleged, so as to bring the case within the exception recognized in *People v. Golden Rule*.”

“Material facts are those which relate to the merits of the cause of action or defense—facts which are within the issues to be tried and which may be made available on the trial as completing the cause of action or defense.”

“It can not be seriously contended that the motives prompting this action can be made a part of the issue to be tried herein within the recognized principles of pleading and practice governing this class of cases.”

"I am therefore of the opinion that the motion to quash the writ can not be sustained upon the grounds set forth in some of the affidavits and this disposes also of the motion for leave to file counter-affidavits. I am of the opinion that such counter-affidavits should be allowed, were I to attempt to determine the truth of the matters set forth in some of the affidavits in support of the motion to dismiss. The authorities cited by counsel for the respondent relate to the practice upon the question of opening defaults, and are not applicable."

"A motion to dismiss a proceeding of this character upon the ground of abuse of process is quite a different question."

"It may be said to raise an issue *de hors* the record—to be tried upon affidavits, and it would be strange indeed if only one party were to be heard. Suppose notice of the application for the writ in this case had been given, and the defendant had come in with the matters charged in the affidavits, before the writ was allowed; it would have been most extraordinary to have denied the state's attorney the right to reply, and certainly if the question of motives or purposes were to be tried now, the same privilege should be accorded to the state's attorney."

"The question now is, whether the court, in the exercise of its discretionary powers, should sustain the motion made by respondents to vacate the order of October 5th (the term of court not having passed), and abate any further proceedings in this cause."

"The mode for instituting *quo warranto* proceedings is usually as pursued in the case at bar. The state's attorney submitted a motion based on affidavit for leave to file an information in the nature of *quo warranto*. A rule *nisi* was made on defendant to show cause why the information should not be filed. Respondent answered the rule by counter-affidavits. This practice is warranted by the authorities. *People v. Shaw*, 14 Ill. 476; *King v. Symons*, 4 Term R. 221; *People v. Tibbits*, 4 Cowen, 383; *People v. Richardson*, 4 Cowen, 103 and notes."

"For cause shown the court, no doubt, has a discretion to

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grant or refuse the leave asked according to the circumstances."

In the case of *People v. Moore*, 73 Ill. 134, the court, in speaking of the practice in this class of cases, says:

"The general rule is, that leave to file an information is not granted of course, but it depends upon the sound discretion of the court upon the circumstances of the case."

"In referring to the amendment of the act concerning *quo warranto* proceedings, in force July 1, 1874, the court further says:"

"It is contended that by this statute the former practice of making a rule to show cause why the information should not be filed, has been abrogated, and can not now be followed; that if probable ground for the information is shown on the face of the petition, then the court must grant the petition, and the word 'may' in the statute may be taken as meaning 'must.'"

"Doubtless the court or judge may grant the petition without any rule to show cause, and it may be the statute contemplates, as the usual course, that the court or judge should act, in view of what appears on the face of the petition, on the *ex parte* application. But we do not perceive any substantial ground for complaint in the course which the court saw fit to pursue in the present instance. It does not appear that the court was satisfied that there was probable ground for the proceeding so as to require it to order the information to be filed."

"In that case a petition was filed by the state's attorney and a motion made for leave to file the information. This motion the court overruled and then entered a rule on the defendants to show cause. Afterward the state's attorney moved that the rule to show cause be vacated, for the reason that the recent statute had changed the form of practice and dispensed with the common law rule to show cause that motion was overruled. The state's attorney then entered a motion to strike from the files the answer of defendants and the affidavits in support thereof. That motion the court overruled."

"Afterward the rule to show cause came on to be heard, the only evidence in the case being the petition, the answer of the defendant and the sworn affidavits filed in support thereof. This the court, as indicated in the above proceedings, held to be the proper practice."

"In the case of *People v. North Chicago Railway Company*, 88 Ill. 538 (decided at the September term, 1888), a petition was filed by the state's attorney for leave to file an information. An affidavit was filed on behalf of the respondent. And the court, speaking through Chief Justice Scholfeld, says:"

'The ruling of this court, the granting of leave to file an information in the nature of a *quo warranto*, is in the sound discretion of the court to which or judge to whom the application is made. Leave on the one hand is not granted as a matter of right upon the part of the relator, and, on the other hand, the court is not at liberty to arbitrarily refuse, but must exercise a sound discretion in accordance with the principles of law.'"

"In the case of *people v. Hamilton*, 24 Ill. App. 613, (decided in 1887), the court says: 'It is familiar that in proceedings by *quo warranto* the court may, in the exercise of a sound legal discretion, refuse leave to file the information.'"

"And in the case of *People ex rel. v. Golden Rule*, 115 Ill. 45 (decided in 1885), the court, in discussing the statute of 1874, seem to indicate that the granting of leave to file an information exhausted its discretionary powers, but the court in that case further says:"

'It is not denied that if the order to issue the summons had been made under a misapprehension of some fact material to be known by the court before making such order, and but for which it would not have been made, it would have been competent for the court to vacate the order at any time during the term.'"

"It would seem under the authorities cited, and under the statute of 1874, that ordinarily the discretion of the court in the issuing of the writ exhausted its powers, unless dur-

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ing the term at which the order is made some fact comes to the knowledge of the court, which, if known before making such order, it would not have been made, it would be competent for the court to vacate the order during the term."

"And if the court is not satisfied that there is some fact, material to the issues in this case, which if known at the time, it would not have made the order of October 5th, then it is my bounden duty to set aside that order, and take such proceedings under the law as I deem consistent with right and justice."

"It also appears that since the passage of the ordinance of November 24, 1890, the railway company and railroad company have proceeded with the work of constructing the road under said ordinance, and has expended in such construction, relying upon the good faith and validity of such ordinance, nearly \$2,000,000; that it has built and equipped, and has now ready for operation, over four miles of its structure over the route described in said ordinance."

"It appears from some of the affidavits filed, that the company intends to begin the operation of trains on the 28th of October, 1893, claiming that its road will be ready for the receiving and discharging of passengers at that date."

"It also now appears, that relying upon the validity of such ordinances, it has caused to be issued a mortgage to secure bonds for the amount of \$6,500,000; that about \$3,000,000 of said bonds have been issued, and are now in the hands of investors who have purchased said bonds in good faith, relying upon the right of the company to construct, maintain and operate such elevated railroad."

"That on May 15, 1893, the city council of the city of Chicago granted an ordinance to respondent company, ratifying and confirming the rights theretofore had under the ordinances of November 24, 1890, to build its road from Canal to Market street."

"It appears also, that on October 4, 1890, the commissioner of public works made a report to the city council in regard to the frontage signed by property owners consenting to the construction of an elevated railroad by the Lake street road."

"Affidavits have also been filed by the secretary of the company and by two others, each of whom state that there was filed with the city council of the city of Chicago, the frontage as required by law."

"Since these proceedings were commenced there have also been read to the court, resolutions passed by the city council of the city of Chicago, requesting the state's attorney of this county to dismiss those proceedings."

"The council have also strenuously insisted that unless these proceedings should be maintained, the rights of owners of property upon Lake street would be jeopardized, for the reason that they would be without remedy for whatever damages they may have suffered by reason of the construction and operation of this road."

"It is not claimed, by counsel in this case, that any action has been taken by any public body representing the people, demanding the institution of these proceedings, in the name and on behalf of the people."

"It also appears that the parties interested in carrying on this great public work have proceeded in the preparation of this road for the carrying of passengers, upon the good faith of the several ordinances passed by the city council."

"The question is, whether the public interests or public policy demands the institution of these proceedings by and on behalf of the people, and also as to what is the duty of the court if it comes to the conclusion that these proceedings are not required by and on behalf of the people."

"It can not be denied that the elevated railroad system in the city of New York has been a great boon to that city, without which people would have been without adequate means of intramural transportation. In the south division of this city, an elevated railroad has been constructed and is now in operation, and without it the means of transportation to the World's Fair would have been wholly inadequate to the demands of the people."

"It is conceded that the building of the Lake Street Elevated Railroad will furnish to the people of the west division of the city of Chicago additional means of transportation over that now given."

“ If the owners of property abutting upon that street are injured or damaged by the construction or operation of this elevated railroad, then they have their remedy in their own name, and in their own right. It is not in consonance with justice that the name of the people should be used in a proceeding like this one, if there is injury to the public good to be prevented.”

“ In the case of *Moses v. Railroad Company*, 21 Ill. 522, Judge Caton, in speaking for the court, says :”

‘ It must necessarily happen that streets will be used for various legitimate purposes which will, to a greater or less extent, discommode persons residing or doing business upon them, and just to that extent damage their property; and yet such damage is incident to all city property, and for it a party can claim no remedy. The common council may appoint certain localities where hacks and drays shall stand waiting for employment, or where wagons loaded with hay or wood or other commodities shall stand waiting for purchasers. This may drive customers away from shops or stores in the vicinity, yet there is no remedy for the damage. A street is made for the passage of persons and property, and the law can not define what exclusive means of transportation and passage shall be used. Universal experience shows that this can best be left to the determination of the municipal authorities, who are supposed to be best acquainted with the wants and necessities of the citizens generally. To say that a new mode of passage shall be banished from the streets, no matter how much the general good may require it, simply because streets were not so used in the days of Blackstone, would hardly comport with the advancement and enlightenment of the present age. Steam has but lately taken the place, to any extent, of animal power for land transportation, and for that reason alone shall it be expelled from the streets? For the same reason camels must be kept out, although they might be profitably introduced. Some fancy horse or timid lady might be frightened by such uncouth objects. Or is the objection not in the motive power used, but because the carriages are larger than were

formerly used, and run upon iron and are confined to a given track in the street? Then street railroads must not be admitted, for they have large carriages which run on iron rails and are confined to a given track. Their momentum is great and may do damage to ordinary vehicles or foot passengers. Indeed, we may suppose or assume that streets occupied by them are not so pleasant for other carriages, or so desirable for residences or business stands as if not thus occupied. But for this reason the property owners along the street can not expect to stop such improvements. The convenience for those who live at a greater distance from the center of a city requires the use of such improvements, and for their benefit the owners of the property upon the street must submit to the burden when the common council determine that the public good requires it. Cars upon street railroads are now generally, if not universally, propelled by horses, but who can say how long it will be before it will be found safe and profitable to propel them with steam or some other power besides horses? Should we say that this road should be enjoined, we could advance no reason for which it would not apply with equal force to street railroads; so that consistency would require that we should stop all. Nor would the evil which would result from the rule we must lay down stop here. We must prohibit every use of the street which discommodes those who reside or do business upon it, because their property will be damaged.'"

"The case quoted from has been followed by many cases since in the Supreme Court of our State, so that it is now the settled doctrine of the law in this State, that the city council has the power to grant the use of the streets for railroad purposes, when in its judgment the public good demands that the same be done; subject, however, to the provisions of the law requiring the consent of property owners."

"The city council in this case has declared that the public good demands that additional means of transportation should be given to the people of the west division of the city, by means of an elevated railroad upon Lake street. The

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court has no right to disregard this declaration by the city council."

"The public good, therefore, under the decision of the Moses case quoted from, must be held to have demanded the construction and operation of this elevated railroad upon Lake street. If the public good demanded the construction and operation of this elevated railroad, certainly there could not be, of necessity, any injury or damage to the public interests."

"As stated by the court in the Moses case, while the building of this road may discommode those who reside and do business upon it, yet, can the courts, when the city council has declared that the public good requires the building of this railroad, step in and say that it will exercise its judgment in the place of the representatives of the people to whom this power has been delegated?"

"The claim is made in the information filed in this case, that by reason of the fact that the railway company did not have its road constructed and in operation by the 24th day of November, 1892, that therefore all of its rights under said ordinance ceased."

"In the opinion of the court the question as to the rights of the company under that ordinance has been settled by the Supreme Court of this State in the case of the Chicago Street Railway Company v. People, 73 Ill. 541."

"It would seem, therefore, that every question raised by this information, except the one hereafter stated, has been settled by our own courts beyond controversy, and the only remaining question raised by the information is as to whether or not there was a petition before the city council signed by the owners of property, as required by law."

"It should be borne in mind, the ordinances sought to be declared invalid under this proceeding, were passed nearly three years ago, and no attack made by the State or city against the validity of the same for want of sufficient signatures. And since the passage of the same, the city council, on May 15, 1893, re-confirmed the right of the company thereto and extended the authority of the company to

build about thirty miles of additional railroad, and all this time without any protest from the State or city against the validity of the ordinance."

"Does public policy demand that, at this late day, such action of the city council should be called in question by the court? 'Public policy is that principle of law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good.' People ex rel. v. Chicago Gas Trust, 130 Ill. 268."

"Is it for the public good to test the question of the validity of said ordinances, by reason of the want of frontage, as required by law, as alleged in this case?"

"The public good would seem to demand this additional means of transportation."

"It was not shown to the court in the argument of this motion, nor was it contended that there was any injury to result to the public, as a public, by reason of the building and operation of this railroad, nor was it contended that the public good was injured or interfered with by the construction and operation of this road."

"The court must therefore hold that it finds no injury to the public interests by reason of the construction and operation of this elevated railroad. That if there be any injury at all, it is simply an injury to private interests. The city council, who, as the Supreme Court in the Moses case says, has the right to declare what is for the public good, has declared that the public good demands the construction and operation of this road, and that the public interests do not demand the institution of these proceedings nor the removal of this road from Lake street."

"Such being the case, the court, under the premises, must hold that the name of the people should not be permitted to be used in a proceeding of this kind except where a wrong is being done the public."

"And in the case of People ex rel. v. The Chicago Railroad Company, 88 Ill., the Supreme Court says:

"Where a corporation, by the exercise of powers not con-

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ferred by its charter, does no private injury and commits an offense against the public alone, the State may punish or waive the right to do so, as in the judgment of those intrusted with the appropriate power in that respect may be deemed most in consonance with the public interests. If a wrong is done by the abuse of a franchise, it is a public wrong, and a proceeding by *quo warranto* must be made by the public prosecutor or other authorized agent of the State, and a private citizen can not in such case have the aid of this extraordinary remedy.’”

“And in speaking of the authority of the attorney-general or state’s attorney to file an information affecting public rights only, “must act in his official capacity under a sense of official duty, and not merely lend his name for the use of a private party; and the proceeding must be official in fact, and not simply official in form, but private in fact.”

“In all matters in which the public alone is concerned, the law has wisely placed the control of legal proceedings in its officers selected for that purpose, and it is never admissible that these proceedings shall be allowed to be used as mere instruments for the gratification of private malice or the attainment of personal and selfish ends.”

“The court below, in the exercise of its discretion, was authorized to take into consideration the circumstances showing the character of the proceeding, and if satisfied, as we think it was justified in being, that the purpose was merely to allow a private party to institute proceedings in a matter concerning the public alone, it was not only within its discretion, but likewise its duty to refuse to allow the information to be filed.”

“And in the case of *People v. Drainage Commissioners*, 31 App. Ct., the court say: ‘A *quo warranto* is an appropriate remedy only in those cases where the public have, in theory, at least, some interest in the controversy. It may well be doubted whether in the present case any public interest appears. While in form the proceeding is in behalf of the people to test the right to exercise a corporate franchise, yet in fact the interests involved are mainly private, if not wholly so.’”

“ And in case of *People v. Boyd*, 132 Ill. 60, the Supreme Court say: ‘ If the state’s attorney should file information in his official capacity, when in fact he was only representing the private rights of an individual, the court would not be bound to so regard it, if the nature of the case and object sought showed the contrary. This, we think, is clearly deducible from the opinion in *People ex rel. v. North Chicago Railway Company*, 85 Ill. 537.’ ”

“ In *Spelling on Ex. Relief*, Sec. 1830, it is said: ‘ The people of the State have no right to invoke the action of the courts of justice in this form, for the redress of civil wrongs sustained by some citizens at the hands of others. When the people come into court in the name and right of sovereignty, as plaintiffs in a civil action, they must come upon their own right for relief, to which they are themselves entitled. It is not sufficient for them to show that wrong has been done to some one; the wrong must appear to be done to the public, in order to support an action by the people for redress.’ ”

“ And in Sec. 1829 it is said: ‘ The court will refuse to forfeit, though the corporation is clearly guilty of a mis-user, where it appears that no injury has resulted to the public. The general rule is, to warrant a forfeiture of corporate franchises for non-user, the mis-user must be such as to work or threaten a substantial injury to the public.’ ”

“ The case of *People v. Gas Company*, 38 Mich. 154, holds the same doctrine that our Supreme Court does in the 73d Ill., that the right granted by an ordinance to build a railway in the streets is not a franchise, but a mere grant of authority, and rests in contract or license, and in nothing else. And in speaking of this contract, the court says: ‘ It in no way concerns the State whether the power is granted or withheld, nor whether the corporation has or has not fulfilled its agreements. The injured party has a remedy for any grievance, but the State is no more interested than it would be in the question whether or not a railroad company had lawfully acquired its right of way.’ ”

“ And in case of *State v. Railroad Company*, 33 N. E. Rep.

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1053, in speaking of a right of *quo warranto*, says: 'It is not a suit for the vindication of the proprietary rights of the individual as against the claim of a corporation, the remedies of an individual against a corporation for the recovery of damages to property being the same as against a natural person.' "

"In the case of *People v. Brooklyn R. R. Co.*, 89 N. Y. 75, it is said: "

'In an action of *quo warranto* the attorney-general represents the whole people, and a right of action can be used only where it affects mere individual and private rights.' "

"In the case of *People v. Railroad Company*, 57 N. Y. 12, the court say: "

"The people of this State have not general power to invoke the action of the courts of justice by suits in the name of sovereignty, for the redress of civil wrongs sustained by some citizens at the hands of others. When they come into court as plaintiff in a civil action they must come upon their own right for relief, to which they are themselves entitled. It is not sufficient for the people to show that wrong has been done to some one; the wrong must appear to be done to the people in order to support an action by the people for its redress. The suit now before us seems to have been instituted on a different theory. It sets forth various acts as wrongful, which, if wrongful, affect no public right. These wrongs are wrongs to individual citizens and not to the State, and are remediable at the suit of the parties injured only.' "

"The question has occurred to this court as to whether the lapse of time alone in this case is not sufficient to bar the people from maintaining the action, if the public interests were affected by the acts complained of."

"In the case of *People v. Boyd*, it was sought to test the right of certain trustees to hold the office of directors of a certain school district, and the court says: "

"We apprehend the statute of limitation and the lapse of time would operate against the prosecution in a given case

in whatever form it might assume. If this were not so, form and not substance, would govern the substantial rights of parties. It would seem to us that this case ought to fall within that class of cases where the statute of limitation should apply, and the right to file the information should be refused on the ground of public policy, even before the lapse of five years, if the time elapsed were such that a wrong would be done by granting the writ. In other words, after a considerable lapse of time, public policy forbids that discretionary writs like those in *quo warranto* and *certiorari* should be granted.' ”

“And it was held in that case that three years was such a lapse of time that the court would not permit the acts complained of to be tested by a writ of *quo warranto*.”

“If the lapse of time were not sufficient to bar the State from commencing any proceedings in this matter, then no party would be safe in dealing with corporate rights and privileges. This class of ordinances has been defined by our Supreme Court to be property. See *Railroad Company v. Railroad Company*, 87 Ill. 322.”

“Being property, the State has no right to interfere at this late day, and deprive the people who have purchased the bonds of this company of such right of property.”

“In the opinion of the Supreme Court in the case of *The People v. Boyd et al.*, 132 Ill. 60, the doctrine is expounded that the right to file the information should be refused on the ground of public policy where there has been such a lapse of time as that “a wrong would be done by granting the writ. (Ibid. page 69.)”

“It is a matter of public notoriety that the enterprise in question is well under way; months and years have passed since it was entered upon, a superstructure extending many miles has been erected, a track laid, large amounts of money have been expended, debts incurred and rights acquired—and to put such an enterprise in peril by means of the present proceedings would certainly be a great wrong.”

“No good, therefore, could come to the public to permit this proceeding to be carried on and undo that which has been done.”

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“The rule in this class of cases being that the State is not bound to show anything, but that if this proceeding is permitted to go on, then the company respondent must show everything, it must show the validity of its ordinance by showing that there was sufficient frontage, if such question can be raised by this proceeding.”

“What is then the duty of the court? Should I allow these proceedings to be continued, or should I say that the court will stop where it is now, and allow them to proceed no further?”

“In the case of *People v. Hamilton*, 24 App. Ct. 609, the court says: ‘When it appears that the writ was improvidently issued, the court may well decline to grant the relief sought. The issuing of the writ does not end the discretion of the court, and if the case made by the pleadings is such that leave to file would have been refused in the first instance, the court may decline to proceed to judgment.’ *Commonwealth v. Cheely*, 56 Pa. State 270.”

“And in the case of *People v. Drainage Commissioners*, 31 App. Ct. 219, the court say: ‘While in form the proceeding is in behalf of the people to test the right to exercise a corporate franchise, yet in fact the interests involved are mainly private, if not wholly so. The court may decline to proceed with the inquiry when such an aspect is disclosed. The issuing of the writ does not end the discretion of the court, and if the case made by the pleadings is such that leave to file would have been refused in the first instance, the court may abate the proceedings.’”

“And in the 88th Illinois, it was said: ‘The court below, in the exercise of its discretion, was authorized to take into consideration the circumstances showing the character of the proceeding, and if satisfied, as we think it was justified in being, that the purpose was merely to allow a party to institute proceedings in a matter concerning the public alone, it was not only within its discretion, but likewise its duty to refuse to allow the information to be filed.’”

Under the decisions which have been quoted from by the court in this proceeding, it was the duty of the court, upon

presentation of the petition in the case, to grant leave to file the information, as it did, on the 5th day of October; but under the decisions, the power of the court over the order did not expire until the end of the term. The motion to vacate this order having been made during the term of court, the court has the power to vacate or not, as in its judgment it may deem advisable."

"The court feels satisfied that it is fully sustained, under the law of this State, in holding the propositions which it has therefore set forth, and that it is the bounden duty of the court, under the law as so found, to say that it will proceed no further with the inquiry in this case."

"The proceedings, therefore, and order of court granting leave to file the information in this case, will be set aside and vacated, and held for naught, and the proceedings ordered abated."

The first question that confronts us is whether the court may review its own action and vacate the order permitting the information to be filed, not only because of any "misapprehension of some material fact," but because upon further consideration the court is convinced that it ought not to have granted the order in the first instance.

We are bound by the decision of the Supreme Court in *People v. Golden Rule*, 114 Ill. 34, in the negative, but submit that the question deserves re-consideration.

That a judge, in vacation, making such an order, may not in vacation set it aside, may be conceded, since, in vacation, the judge has no other judicial power than what the statute gives.

But in term, the court has generally, so long as the proceedings are *in fieri*, the power to undo anything that has been done in the case, whether by the same or by another judge. *Niagara Fire Ins. Co. v. Scammon*, 35 Ill. App. 582; *Fort Dearborn Lodge v. Klein*, 115 Ill. 177; *Black on Judg.*, Secs. 308, 509, 694.

The authority cited by the Supreme Court does not support their position. High cites only, *State v. Brown*, 5 R. L. 1, where the court disavowed all right to exercise any dis-

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cretion to dispense with the law on the trial of the case upon its merits. "Only that and nothing more." But here the court had on the motion to vacate, notice of "material facts" brought to it, of which it had no previous judicial knowledge.

The petition did not state that any portion of the road had been built. On the motion it did appear that over three miles of road had been built, over \$2,000,000 of capital invested, and that the road would be ready to run cars within twenty-three days, at the time the petition was filed.

Nowhere in the papers does it appear that the public can be put to the least inconvenience by the road. It is only outside of the record that we know whether the road is above, below or at the street surface, unless the word "elevated" conveys knowledge.

If we were to decide upon the question of nuisance or no nuisance, the decision would be in the negative, even taking into account all our non-judicial knowledge of the structure. Travel is not impeded.

There may be a purpresture. *Quo warranto* is not an appropriate remedy for that. A judgment of ouster would not take down the structure, nor could one of seizure pass the property in it to the State. Wood on Nuisance, Ch. 3.

The fee of the streets is in the city, or abutting owners; the public have the right of unrestricted use of them for travel, and in that right are not disturbed. The fact that the appellee is a corporation cuts no figure, its right so to be not being in question. Many corporations in this city own buildings in front of which are sidewalks—part of the streets under which vaults, rooms, closets, have been constructed—doubtless under permits from the city—by the corporations. Will informations in the nature of *quo warranto* lie to inquire into their right to occupy?

If private rights are infringed, there are appropriate remedies. For encroachments upon the highway *quo warranto* is not the remedy. The judgment of the Criminal Court dismissing the information is affirmed.

Rudolph Gerber v. Rebecca Gerber.

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1. DEFENSES—*Former Suit Pending.*—Where a wife in a bill for divorce states that she once before filed a bill for the same purpose, which “she consented to dismiss,” but whether she ever did dismiss it her bill does not state, and in his answer the husband “denies each and every allegation therein contained except as to the fact of said marriage having taken place between these parties,” no record of any former suit being in evidence, it is not a sufficient showing of a former suit pending.

Memorandum.—Bill for divorce. Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed July 2, 1894.

B. M. SHAFFNER, attorney for appellant.

WALKER & DAVIS, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee filed this bill for divorce charging extreme and repeated cruelty.

The court upon conflicting testimony, seeing the witnesses (*Burt v. Burt*, 40 Ill. App. 536), found “that all the material facts alleged in said bill are true, and that the defendant has been guilty of extreme and repeated cruelty as therein set forth,” and upon that entered a decree for a divorce, and that she be allowed to resume her former name. No alimony, no custody of children, not even her costs in the court below (for the decree is silent as to costs) are involved; but she was a widow with some money, and he has none.

Her bill states that she once before filed a bill for divorce from him which “she consented to dismiss,” but whether she ever did dismiss it her bill does not state; and his answer to the present bill “denies each and every allegation therein contained, except as to the fact of said marriage having taken place between these parties.” No record of

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any former suit is in evidence. There is but a slender foundation for the argument of the appellee as to the effect of a former suit.

There is no ground for disturbing the decree appealed from and it is affirmed.

William M. Crilly v. The Board of Education of the City of Chicago.

1. **MISTAKES—Measure of Proof.**—The proof to establish a mistake in a material part of a contract ought to be free from suspicion, clear and convincing.

Memorandum.—Bill for relief. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed May 28, 1894.

W. A. FOSTER, attorney for appellant.

DONALD L. MORRILL, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee advertised for bids for doing the mason work required for the construction of a school house, and the appellant in response thereto made in due form a bid to do the work for the sum of \$20,997. Accompanying his bid, he inclosed a certified check on his banker for the sum of \$630, in compliance with a rule of the appellee that proposals, involving amounts exceeding \$2,000, shall be accompanied by a deposit of three per cent of the amount thereof, and that if, in case of the contract being awarded to the bidder, he shall fail to enter into a written contract, or give a satisfactory bond to secure compliance with the proposal, or both, within a reasonable time, the said deposit may be retained and forfeited as liquidated damages.

At a regular meeting of the appellee held in apt time after the receipt of appellant's bid, the contract was awarded to the appellant, he being the lowest bidder, and he was so notified.

But he refused to accept the contract, and claimed that he had made a clerical mistake in writing out his proposal, and that his bid should have been made at the price of \$23,997.

Appellee at a subsequent meeting declared appellant's deposit forfeited and let the contract to the next lowest bidder at the sum of \$24,200, who went on and performed the work.

Thereupon appellant filed his bill in equity, praying that his bid be corrected and decreed to be a bid for the sum of \$23,997, and that his deposit be repaid to him.

The cause was heard upon bill and answer, and evidence taken before a master with his report thereon, and a decree entered dismissing the bill for want of equity, and from such decree this appeal is prosecuted.

The bid of appellant was on a blank form furnished by the appellee to persons contemplating making proposals, whereon were printed the rules of the appellant with reference to such business, the pertinent part of which, so far as this cause is concerned, have been stated, and ending with the following form, with blank spaces filled to suit the particular case, signed by appellant, as follows:

"Deposit enclosed: Certified check, \$630.

CHICAGO, Aug. 1, 1892.

To the Board of Education:

The undersigned hereby offers to furnish material and do the mason work in the erection of the school building, Lincoln and Moore Sts., according to the plans and specifications in the office of the architect of your board, for the sum of 20,997.00 dollars (\$20,997.00), and agrees to be bound by the conditions as printed above.

W. M. CRILLY."

The explanation of appellant is that learning of the invitation of appellee for proposals to do the specified work,

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he made up an estimate upon which he would base a bid; that that estimate footed up \$24,008; that he concluded to make a bid of \$23,997, in order to be lower than any person who should bid the even sum of \$24,000; that in transcribing those figures upon the blank proposal upon which bids were required to be submitted, he, by mistake, placed a cipher where he intended to place the figure three, thereby making his bid \$20,997, instead of \$23,997, as he intended to do, and that he did not know of his mistake until after his bid was accepted by appellee.

It will be observed that the amount of the check deposited is three per cent upon \$21,000, three dollars more than his bid, and not three per cent on \$23,997. This is explained by appellant as being a mistake also, as a result of the first mistake, and if the check were drawn with the amount of the bid in mind rather than the amount of the estimate, it was not an unlikely one.

The master reported as his conclusion, that the evidence was insufficient to base a finding upon, that a mistake, such as equity ought to relieve against, was actually made; and that the mistake, if any was made by appellant, was due to his own negligence, and might have been avoided by the exercise of ordinary care and diligence on his part, and was not such a mistake as entitled appellant to relief in equity.

The court took the same view of the case and dismissed the bill.

We are not prepared to say that the master was not correct in both conclusions. The proof to establish a mistake in a material part of a contract ought to be free from suspicion, clear and convincing.

Here on the one side was the proposal of the appellant, made on a printed sheet furnished by the appellee, with blank spaces left for the amount to be written in, and in those spaces the amount is twice stated. The check that was made out at the same time was for an amount equal to the required per centage on an even sum within three dollars of the amount of the bid.

The amount was the only material matter left to be in-

serted in the blank. The writing inserted in both the blank proposal and the check was done by the appellant in person, and whatever, if any, error was committed, was made by him with full knowledge.

To overcome the effect of the writing so executed, nothing but the bare statement of the appellant is shown. The circumstance that he had previously made an estimate that footed up a considerably larger sum, as a guide for himself in determining what amount he might safely and profitably bid, can not be said to be corroboratory of his statement.

It is nothing more than argument, and, indeed, the book in which the estimate was testified to have been made, was not offered in evidence.

The proof therefore stands with the writing on one side, and the testimony of appellant that he made a mistake, on the other.

Without an insinuation, even, against the exact truth of appellant's testimony, we are bound to say that, having such regard as the law imposes upon us for the protection of what parties deliberately put into their written contracts, we are not at liberty to permit such writings to be overthrown by the uncorroborated testimony of an interested witness.

This conclusion renders it unnecessary for us to discuss the question of law, as to when, a mistake being established, equity will afford relief. The decree of the Circuit Court will be affirmed.

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E. Hill Turnock v. M. H. Walker.

1. NON-SUIT—*When the Trial is Without a Jury.*—When a case is tried by the court without a jury a party may take a non-suit at any time before a note has been made of the finding of the court.

Memorandum. — Assumpsit for work, labor and services. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1894. Reversed with directions. Opinion filed June 4, 1894.

Turnock v. Walker.

JAMES TURNOCK, attorney for appellant.

WILLIAM D. RAWLINS and JOHN S. STEVENS, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

In this cause, a jury having been waived, the trial was before a judge of the Circuit Court. In the record is the following:

“Be it remembered that the above cause came on for trial before the Honorable Edward F. Dunne, judge of said court, without a jury, jury being waived by agreement of parties. The court, after hearing all the evidence on behalf of each party, and argument of counsel, then and there proceeded to render his decision orally. While the court was thus rendering his decision, and after he had clearly intimated what his findings would be, but before his finding was concluded, or any note of the finding was made, plaintiff, by his counsel, moved the court for a non-suit, which said motion the court then and there denied, to which said ruling of the court in refusing to allow plaintiff to take a non-suit, plaintiff, by his counsel, then and there excepted.

“Thereupon the court found the issues for defendant and rendered judgment against plaintiff, to which said finding and judgment plaintiff, by his counsel, then and there excepted.”

When a case is tried without a jury a party is entitled to take a non-suit when the same is moved for before a note has been made of the finding of the court. *Adams v. Shepard*, 24 Ill. 464; *Howe v. Harroun*, 17 Ill. 494; *Shabad v. Hanchett*, 40 Ill. App. 545; *Prindiville v. Leon*, 11 Ill. App. 657; *Wilson Sewing, etc., Co. v. White*, 10 Ill. App. 191.

The judgment of the Circuit Court is reversed and the cause remanded, with directions to permit the plaintiff to take a non-suit; if the plaintiff fail to take a non-suit, the judgment must be as before. Reversed with directions.

Frank Parmelee v. Bernard A. Ennis.

1. APPELLATE COURT PRACTICE—*Objections Must be Made in the Court Below.*—It is too late to raise the objection for the first time in the Appellate Court that there is no evidence to support certain material allegations of the declaration.

Memorandum.—Trespass on the case for lost baggage. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed June 4, 1894.

EDMUND FURTHMANN, attorney for appellant.

ALEXANDER SULLIVAN, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee, who was plaintiff below, coming into Chicago on a railroad train, delivered to an agent of the appellant a valise, to be carried to and delivered at a particular address in the city of Chicago, and paid the charges for so carrying and delivering it. The valise became lost while in the appellant's possession, and a suit for the value of the valise and its contents was brought and a judgment recovered.

At the time of the delivery of the valise to appellant's agent he gave to appellee a baggage check whereon was stamped, among other things, the words "Frank Parmelee Omnibus Line and Baggage Express, 132 Adams street, Chicago," and a particular number.

It is contended that there is no evidence to support the allegation of the declaration that the appellant was a common carrier. We do not concur in that contention, but if we did, it is too late to raise the objection for the first time in this court. *Brannan v. Strauss*, 75 Ill. 234.

The only contest on the trial was as to the amount of damages, and from the evidence we can not say that the jury

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came to a conclusion so clearly wrong as to warrant us in disturbing their finding. The judgment is affirmed.

MR. JUSTICE GARY.

Frank Parmelee would rather lose much more than the amount of this judgment, than have to go upon the record of this court the expression of any doubt that he is a common carrier of passengers and their luggage.

Patrick H. Heffron v. Maggie Brown.

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1. DAMAGES—*The Question of Excessive, How Raised.*—The question of excessive damages can not be raised in the Appellate Court without being first presented to the court below on motion for a new trial.

2. SERVICES—*Whether Gratuitous.*—The question as to whether services rendered were intended to be gratuitous is not a question of law, but of fact, and the parties need not have had the same intent, to entitle a person to recover. If a party expects to be paid and the other knows or believes such to be the fact, and by his language and conduct encourages the party to entertain such expectation, then he must pay, even if he did not intend to do so.

Memorandum.—Assumpsit for wages. Appeal from the Circuit Court of Cook County; the Hon. SAMUEL P. MCCONNELL, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed June 4, 1894.

APPELLANT'S BRIEF, OSBORNE BROTHERS & BURGETT AND
WILLIAM J. CANDLISH, ATTORNEYS.

No rule of law is better established than that where services are voluntarily rendered or support furnished by those near of kin, or by those sustaining near family relations, whether of blood kin or not, the law will imply no contract for compensation, and unless an express contract to pay is shown in such a case, no recovery can be had. Hall v. Finch, 29 Wis. 278; Falloon v. McIntyre, 118 Ill. 292; Collar v. Patterson, 137 Ill. 403; Woolsey v. White, 7 Brad. 277;

Fruitt, Adm'r, v. Anderson, 12 Brad. 421; Cooper v. Cooper, 12 Brad. 478; Meyer v. Temme, 72 Ill. 574; Mowbry v. Mowbry, 64 Ill. 383; Byers v. Thompson, 66 Ill. 421.

This presumption extends even to a friend, a visitor, or a stranger. Scully v. Scully, 28 Iowa, 548; Smith v. Johnson, 45 Iowa, 308; Dunlap v. Allen, 90 Ill. 108; Tyler v. Burrington, 39 Wis. 376; Peltage v. Peltage, 32 Wis. 136; Collar v. Patterson, 139 Ill. 403.

The most liberal construction that can be placed upon the rule as laid down in these cases is, that there must be an express contract, or clear, direct and positive evidence that there was an expectation on the part of one to receive payment, and on the other to make payment. Cooper v. Cooper, 12 Brad. 482; Fruitt v. Anderson, 12 Brad. 421; Scully v. Scully, 28 Iowa, 548; Williams v. Hutchinson, 3 N. Y. 319; Ayres v. Hull, 5 Kas. 419; Hall v. Finch, 29 Wis. 281; Hartman's Appeal, 3 Grant (Pa.) 271; Duffy v. Duffy, 44 Pa. St. 402; Bash v. Bash, 9 Pa. St. 260; Wells v. Perkins, 43 Wis. 160.

It must have been the intention of the person to assume a legal obligation capable of being enforced against him. Hall v. Finch, 29 Wis. 278; Mountain v. Fisher, 22 Wis. 93; Swires v. Parsons, 5 W. & S. 357; Bash v. Bash, 9 Pa. St. 260; Lynn v. Lynn, 29 Pa. St. 369; Duffy v. Duffy, 44 Pa. St. 402; Lantz v. Frey, 14 Pa. St. 201; Defrance v. Austin, 9 Pa. St. 309; Scully v. Scully, 28 Iowa, 548; Coe v. Wagner, 42 Mich. 49; Williams v. Hutchinson, 3 Conn. 312; Fitch v. Peckham, 16 Vt. 150; Wier v. Wier's Admr., 3 B. Mon. 645.

L. M. ACKLEY, attorney for appellee; GEO. W. BRANDT, of counsel.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

These litigants are cousins. The appellant, unmarried, was housekeeping with his mother and sister. The sister died. The appellee was in the country, and the appellant telegraphed to her to come to the city. She was then on a

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vacation, but her employment had been doing housework for wages. The appellant then lived in a small cottage, but very soon moved to a much larger house. There is some vague testimony that he kept a horse and carriage, and a man who lived in the house.

Except what was done by the mother (the condition of whose health, and whether her presence in the house increased or diminished the labor of the appellee, are subjects of conflicting testimony), the appellee managed and did the work of the house, except the washing, for three years. Then a girl was kept, and finally, after the appellant had been married a year or more, the appellee left. No bargain was ever made between the parties about compensation, though there is testimony that after she had been three years there, he said he would pay her for her time. She sued for wages, and the jury has treated her very generously at his expense, but no question of excessive damages is before us, as no such question was presented to the Circuit Court on motion for a new trial. *Calumet Furn. Co. v. Reinhold*, 51 Ill. App. 323; *Giffert v. McGuern*, 51 Ill. App. 387.

The appellant claims that error was committed in permitting a witness who testified that she was a housekeeper, impliedly for wages, and knew the wages paid in many cases throughout the city to housekeepers, to testify what were fair wages. In this there was no error. *Rogers' Exp. Test.* 378. As to another witness, giving much more damaging testimony, whose competency as an expert is not questioned by the brief, the complaint seems to be only that her testimony "undoubtedly impressed the jury," which must have been the purpose in putting it in.

It is the position of the appellant on this appeal, that as the appellee was a cousin of the appellant, and lived upon terms of social equality with him and his mother, no promise of compensation to the appellee could be implied. That unless an express agreement was shown, the law would imply that her services were gratuitous, except so far as compensated voluntarily by the appellant.

A great multitude of cases is cited where courts have

held on the particular circumstances of each case, that for services rendered no compensation could be claimed, and in many of them the courts have loosely talked about what the law would or would not imply; but, in truth, it is not a question of law but of fact. What did the parties intend? No number of decisions upon conclusions from facts make such conclusions rules of law. *Fairbury v. Rogers*, 98 Ill. 554.

And the parties need not have had the same intent to entitle her to recover. If she expected to be paid, and he knew or believed that she did, and by his language and conduct encouraged her to entertain that expectation, then he must pay her, even if he did not intend so to do. The principle of *Chicago W. & S. Co. v. Street*, No. 5058, applies.

He sent for her in his time of need, and the evidence tends to show that for several years she gave her time and strength to the task of keeping up his home, at his request.

In no such case has it ever been decided that relationship and family privileges barred a claim for pay.

The instructions were in accord with our view of the law of the case, and the judgment is affirmed.

MR. JUSTICE WATERMAN.

I think the verdict was clearly in great excess of the amount which the evidence shows either the plaintiff or the defendant expected was to be paid, as well as greatly in excess of what the evidence shows the value of the services rendered to have been.

**Jacob Wolverton and Charles A. Clark v. Geo. H. Taylor
& Co., Geo. H. Taylor and William H.
Longley et al.**

1. APPELLATE COURT PRACTICE—*Improper Briefs*.—A brief which asserts that the allegations of the bill are fully supported by the evidence but contains no reference to either record or abstract, and leaves the

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court to take the counsel's word or grope, as best it can, through the abstract and record to ascertain what the truth as to the matters in dispute is, is not in accordance with the rules of the Appellate Court.

2. *RES ADJUDICATA—Former Decisions.*—The fact that the allegations of the bill have been by this court declared to constitute a good cause of action does not make such allegations *res adjudicata*.

Memorandum.—Bill under Sec. 25, Chap. 32, Ill. R. S., to obtain a judgment. Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed June 4, 1894.

CONSIDER H. WILLETT, attorney for appellants.

TENNEY, CHURCH & COFFEEN, attorneys for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

An original bill in equity was filed January 12, 1888, under Sec. 25, Chap. 32, Ill. R. S., to obtain a judgment against the "Geo. H. Taylor Co." corporation upon its promissory notes, because the corporation was dissolved and ceased doing business, leaving debts unpaid; also to enforce the liability existing under section 16 of the same chapter, as to officers and directors voluntarily assenting to a corporate indebtedness in excess of the capital stock of a corporation, Taylor, the president and a director, and Longley, the treasurer and a director, having assented to this indebtedness in excess of the capital stock.

The "Geo. H. Taylor Co." corporation was organized in 1881, in Chicago, Ill., under the chapter under which suit is brought, for the object of the manufacture, purchase and sale of paper, with a capital stock of \$50,000.

It is stipulated that Geo. H. Taylor as president, and Wm. H. Longley as treasurer, assented to an indebtedness of the corporation to the extent of \$200,000, including the indebtedness upon which this suit is brought.

It was alleged that the corporation had been dissolved, and had ceased to do business, leaving debts unpaid. The bill was therefore filed under Sec. 25, Chap. 32, Ill. R. S., to enforce the liability under section 16 of that chapter, of

officers or directors assenting to an indebtedness in excess of the capital stock of a corporation. It is an original bill in equity to obtain a judgment against a corporation, and a judgment against each officer of the corporation who assented to the indebtedness mentioned in the bill, such indebtedness being in excess of the capital stock of the corporation.

Appellants' brief asserts that the allegations of the bill are fully supported by the evidence, but the brief contains only one reference—that as to an undisputed matter—to either record or abstract; and we are thus, by appellants, left to take their word or to grope, as best we can, through the forty printed pages of the abstract, and the 290 pages of the record, to ascertain what the truth as to the matters in dispute is.

Such a brief is not in accordance with the rules of this court, and we might for that reason, alone, confirm the decree rendered in this cause.

An examination of the record, as well as the brief filed by appellees, discloses that most material and vital allegations of the bill are denied by the answers, and that much evidence was produced tending to show that the position of appellants in respect to the alleged indebtedness of the insolvent corporation to them is such that appellants have no standing in a court of equity.

We infer that counsel for appellants are of the opinion that if the evidence produced by appellees is to be considered at all, the decree of the Supreme Court must be affirmed, as their argument in this court is as follows:

First. The language of the Ill. R. S., Sec. 25, Chap. 32, creates a remedy by an original bill to enforce the contract liability, created by Sec. 16 of the same chapter.

Second. The allegations contained in this bill, state a cause of action, and such allegations have become *res adjudicata*. *Wolverton v. Taylor*, 132 Ill. 197; *Wolverton v. Taylor*, 43 Ill. App. 424.

Third. The proofs offered in evidence sustain the allegations of the bill, and each assignment of error is insisted upon by appellants.

Dueber Watch Case Mfg. Co. v. Young.

The fact that the allegations of the bill have been, by this court, declared to constitute a good cause of action, does not make such allegations *res adjudicata*.

This court is in this cause bound by the judgment by it rendered upon a former appeal, as well as by the judgment of the Supreme Court; but this court has not passed upon the truth of any of the allegations of the bill, and the judgment of this court, as well as that of the Supreme Court upon a former appeal, left appellees at liberty, under permission of the Superior Court, to deny the allegations of the bill, or to set up new matter in evidence thereof.

We have examined the certificate of evidence filed, and are of the opinion that the bill of appellants was, upon the hearing, properly dismissed for want of equity. Equitably the insolvent corporation is not indebted to appellants.

The decree of the Superior Court is affirmed.

Dueber Watch Case Manufacturing Company v. Max Young.

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1. **ERROR—In Instructions, When Not Material.**—When the evidence will not warrant a verdict for a party, an error in the instructions is not material.

2. **INSOLVENT DEBTORS—Payment of Debt Before Maturity.**—An insolvent debtor, abandoning hope, may pay one creditor whether his debt has matured or not, and be guilty of no fraud, though the effect be that nothing is left for others.

Memorandum.—Attachment for debt. Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed June 4, 1894.

FLOWER, SMITH & MUSGRAVE, attorneys for appellant.

APPELLEE'S BRIEF, MONK & ELLIOTT, ATTORNEYS.

The giving of erroneous instructions, or the refusal to give proper instructions, will not justify a reversal when it clearly

appears that substantial justice has been done, and that another trial ought to lead to the same result. *Hughitt v. Jones*, 72 Ill. 218; *Beard v. Maxwell*, 113 Ill. 440; *Miller v. Administrator*, 29 Ala. 174; *Greenup v. Stoker*, 3 Gilm. 202; *Greene v. Greene*, 145 Ill. 264.

A debtor has the right to pay or secure a *bona fide* indebtedness to a creditor, although such act may operate to prefer him over others of his creditors. Such preferences are not fraudulent in fact or in law. An attachment can not be based upon the transfer, either intended or accomplished, by a debtor of his property to pay or secure honest debts, though such transfers cut off, and are intended to cut off, the redress of all others. *Morrison v. Tillson*, 81 Ill. 607; *Francis v. Rankin*, 84 Ill. 169; *Tomlinson v. Matthews*, 93 Ill. 179; *Goembel v. Arnett*, 133 Ill. 352; *Hanchett v. Kimbark*, 118 Ill. 121; *Shroeder v. Walsh*, 120 Ill. 403.

SMOOT & EYER, attorneys for the assignee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant sued out an attachment against the appellee, upon the allegation in the affidavit that the appellee was "about fraudulently to conceal, assign or otherwise dispose of his property or effects, so as to hinder or delay his creditors."

We shall not attempt to justify the instructions to the jury on behalf of the appellee, but hold that the evidence would not have warranted a verdict for the appellant, and therefore error in the instructions is not material. *Beard v. Maxwell*, 113 Ill. 440; *Fritz v. Fritz*, 36 Ill. App. 31.

An insolvent debtor, abandoning hope, may pay some creditors whether the debts have matured or not, though the effect be that nothing is left for others, and be guilty of no fraud. *Ill. Paper Co. v. N. W. Nat. Bk.*, 149 Ill. 450.

A curious question might have been raised on the trial. After the attachment was levied Young made an assignment for the benefit of creditors. The assignee interpleaded in this suit, claiming the goods attached. The appellant put in

North Chicago St. R. R. Co. v. Fitzgibbons.

evidence what the appellee said in an examination before the County Court in the insolvency proceedings. As against himself his declarations, whether under oath or not, were admissible, but as against his assignee, his declarations, after the assignment, were not admissible.

Now if the attachment levied before the assignment were sustained by his declarations made after the assignment, what title would the assignee have? The judgment is affirmed.

North Chicago Street Railroad Company v. Margaret Fitzgibbons.

1. VERDICTS—*Against the Preponderance of the Evidence.*—Where the verdict is against the great preponderance of the evidence, it must be set aside.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed June 4, 1894.

The opinion states the case.

APPELLANT'S BRIEF, JOSEPH B. MANN AND EDMUND FURTHMANN, ATTORNEYS.

A verdict rendered upon the unsupported evidence of the plaintiff, which is contradicted by that of the defendant corroborated by other unimpeached witnesses, will be set aside as against the law and evidence. *Peaslee v. Glass*, 61 Ill. 94; *Dinet v. Reilly*, 2 Bradw. 316; *Haycraft v. Davis*, 49 Ill. 455; *Lincoln v. Stowell*, 62 Ill. 84; *Koester v. Eslinger*, 44 Ill. 476; *Chicago City Railway Co. v. Delcourt*, 33 Ill. App. 430; *C. W. D. Ry. Co. v. Conley*, 43 Ill. App. 439.

DUNCAN & GILBERT, attorneys for appellee.

54	385
78	648
79	634
54	385
85	490

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action to recover damages for personal injuries sustained by appellee in stepping off one of appellant's cars.

The question in dispute was whether the car had stopped and started up as appellee was getting off, or whether she got off as the car was stopping and before it came to a halt.

Appellee and one other witness testified that the car having stopped, she attempted to alight, and while doing so, the car started and she was thus thrown to the ground.

Five witnesses testified that appellant got off before the car stopped, and the testimony of five others is not consistent with appellee's statement. Of these ten witnesses but one was at the time of testifying in the service of the company; three, including this one, were in its service when the accident happened.

Appellee called a police officer, and his testimony not sustaining appellee's account of the occurrence, she attempted to introduce a police minute book showing a report made by such officer of the accident. It appeared that the police officer made to the desk sergeant a report of the accident, and that the desk sergeant committed to writing what was told to him.

We do not think that this report can be considered by us in arriving at a conclusion in this case. The very great preponderance of the evidence is with the appellant. Appellee, if entirely uninfluenced by her position in the case, can not be presumed to have had a more accurate remembrance of the circumstances leading to the accident than the other witnesses.

It is true that juries are not to count witnesses so much as to weigh what they say; and a reviewing court must bear in mind, that to a jury is the determination of the question of fact committed.

Nevertheless we can not fail to notice wherein, not the mere preponderance, but the great preponderance of the evidence lies. There is not in the statements of the wit-

nesses for appellant anything inherently improbable, nor does it appear that they have any reason for being biased or testifying untruthfully.

The judgment obtained, \$14,200, is a large one, and we think that the evidence presented by this record is such that the cause should be committed for another trial. The judgment of the Circuit Court is reversed and the cause is remanded.

MR. PRESIDING JUSTICE SHEPARD, DISSENTING.

On the question that the verdict was against the weight of evidence, which is the view the majority of the court take, I do not agree. The jury and the trial judge saw and heard the witnesses and observed their manner of testifying, and I prefer to rely upon their conclusion rather than upon a conclusion arrived at from a bare reading of their testimony. The damages are greater than the evidence seems to justify, and on that account, alone, if at all, can a reversal of the judgment be justified, in my opinion. But before reversing on that ground, I would afford opportunity to appellee to remit in this court, down to a more reasonable sum.

MR. JUSTICE GARY.

This case is substantially like *Goss & Phillips Mfg. Co. v. Suelan*, 35 Ill. App. 78, and *North Chicago St. Ry. Co. v. Lotz*, 44 Ill. App. 78.

The appellee's case stands only upon her own uncorroborated testimony; for that of the other witness mentioned by Judge Waterman, is so contradictory in itself, that it can not fairly be regarded as corroborative of anything.

**Chicago & Western Indiana Railroad Company and the
Belt Railway Company of Chicago, v.
Edmund A. Flynn.**

1. RAILROADS—*Negligence of Servants*.—An engineer of a train on the main track was signaled, with a lantern, to go ahead, by a brake-

man on the rear end of a train which had just entered upon a switch for the purpose of letting him go by. It was the duty of the brakeman to close the switch, but failing to do so the engineer came on rapidly. Upon discovering the open switch he jumped from his engine. Some of the cars were derailed, and falling upon him, permanently injured him. The railroad company was held liable.

2. FELLOW-SERVANTS—*Engineer and Brakeman on Another Train.*—An engineer in charge of a locomotive engine is not the fellow-servant of a brakeman on the rear end of another train on a side track signaling the engineer to go ahead.

3. FELLOW-SERVANTS—*The General Rule.*—The rule that a servant can not recover against the common master for injuries resulting from negligence of a fellow-servant, implies necessarily that they are fellow-servants at the time of the negligent act.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed June 4, 1894.

OSBORN & LYNDE, attorneys for appellants.

BARNUM, HUMPHREY & BARNUM, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee was a locomotive engineer in the service of the appellants, and near midnight on the 16th day of March, 1891, was running a train south on the "Belt railway." He had orders to meet a train going north at a place south of the crossing of the Wisconsin Central railway, at which crossing was a semaphore. His right to cross that railway or not was determined by signals from that semaphore. He stopped north of that crossing and saw to the south the movement of the train he was to meet. That train backed south on the main track, pulled in north upon a side track, and then the appellee saw a signal given with a lantern from the rear of that train that the main track was clear, which signal was repeated from the head of the same train, and the semaphore showed a signal to cross the other railway.

The man at the rear of the north bound train, should, when the train was in upon the side track, have set the switch, connecting the side track with the main line so as to make a continuous track of the main line, but he did not.

At the switch was a stand, which should automatically have shown a red light if the switch was not set for continuous track on the main line, and a green or blue light if it was so set; but there was no light in the lamp; and there is much evidence that because of a faulty construction of that stand, a light would not remain burning in the lamp.

There was a rule of the appellants, which the appellee knew, that "a signal imperfectly displayed, or the absence of a signal at a place where a signal is usually shown, must be regarded as a danger signal, and the fact reported to the master of transportation."

There was evidence that this lamp had been so reported, but, as several witnesses testified, the light was very often out, and it was a common practice to run by the switch without regard to the light.

The appellee ran toward the switch at a high speed in order to gain momentum for an ascending grade which he was approaching; saw from his place on the locomotive when he neared the switch that the rails did not make a continuous line, and jumped from the locomotive; cars tumbled upon him and he received very severe and probably lifelong injuries. He sued the appellants, and has recovered \$15,000 damages.

On the evidence it is impossible to say that these damages are extravagant, or more than a fair and adequate compensation, and it is useless to go into detail about them.

Two questions are in the case.

First, whether the conduct of the appellee in disregarding the rule of the appellants that the absence of the light "must be regarded as a danger signal," bars the action.

There is no dispute about the facts; he knew the rule, and fully understood its meaning and application to the absence of the light. But by the course of business the man at the rear of the other train was acting by authority of the appellants in giving the signal he did; the signal was the act of the appellants, given by that man to the conductor of that train, and by him repeated to the appellee, and as so repeated, it meant "go ahead."

With the evidence that the light was often out—that it was not at all unusual to run past that switch at night when no light was there—that the defect as to the light was a fault of construction—and with this signal as an act of the appellants to “go ahead,” it was a question for the jury whether the appellee was or was not careless, and their verdict stands. *L. S. & M. S. v. Parker*, 131 Ill. 557, 33 Ill. App. 405, was not a case of master and servant, but still is in point on this question of due care by the appellee. In that case Parker could only infer that the switch was right; here the appellee was, by signs, told that it was right.

The second question is whether the man at the rear of the other train, and the appellee, were fellow-servants. That they had been fellow-servants on some previous occasions, when that man and the appellee had worked in the same crew, seems to be beside the question. *Chicago & Alton R. R. v. Kelly*, 28 Ill. App. 655.

The rule that a servant can not recover against the common master for injuries resulting from negligence of a fellow-servant implies necessarily that the servants are fellows at the time of the negligence.

Now, in *Chicago & Northwestern Ry. v. Snyder*, 117 Ill. 376 and 128 Ill. 655, the court in effect decided that it was a question for the jury whether one who operated a semaphore by which the movement of trains was directed, was a fellow-servant with a conductor obeying the signal.

What difference in principle can it make, whether another servant gives the signal which is to be obeyed, from machinery erected for the purpose, or with a lamp, when in either case the signal is for the same purpose, and the two servants do not have, and by their distance from each other can not have, any other communication, and obedience to the signal, in safety, immediately sends the one away from the other?

Nor did the employment of the two servants in like service necessarily constitute them fellow-servants; it was for the jury to decide. *Chicago, Burlington & Quincy R. R. v. Fitzgerald*, 40 Ill. App. 476.

Weare Commission Co. v. Druley.

These views cover all questions in the case. The appellee asked no instructions, and the court gave for the appellants much more favorable ones than this opinion will justify. Happily, the record is such that every question, except the measure of damages, is open for review by the Supreme Court. The judgment is affirmed.

MR. JUSTICE WATERMAN.

I am of the opinion that, in consideration of the great number of human lives whose safety depends upon the exercise of the highest care by locomotive engineers, the willful disregard by such an engineer of a known danger signal, ought to be conclusive evidence of negligence on his part; that public policy demands this; but I am not prepared to say that such is the rule in this State.

MR. PRESIDING JUSTICE SHEPARD.

In my opinion, it was the duty of the appellee, in the presence of the danger signal, to have so run his locomotive as that the train should have been kept within his control until the place of danger had been passed; and, not having done so, he should be barred of a recovery.

Weare Commission Company v. Mary A. Druley, Administratrix of Estate of William M. Druley, Deceased, et al.

54	391
158s	25

1. **DEEDS—Delivery.**—W. executed and placed in the hands of his brother E. a deed of land to his father, to whom he was indebted, but in trust for his mother, with instructions to E. to carry it in his pocket, and if he (W.) got well, return it to him; but if he did not get well, to put it on record. E., contrary to instructions, put it on record a few days prior to his brother's death. *It was held* that the transaction did not amount to a delivery.

2. **ATTACHMENT—Fraud as a Ground.**—The fraud for which an attachment will lie is fraud in fact. The debtor must have intended an actual fraud.

Memorandum.—Assumpsit. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed July 2, 1894.

APPELLANT'S BRIEF, OSBORNE BROS. & BURGETT,
ATTORNEYS.

If the deed made by William M. Dudley was intended as a mortgage, or there was a secret trust retained in the property for him, the deed was fraudulent as to plaintiff and his other creditors. *Metropolitan Bk. v. Godfrey*, 23 Ill. 579; *Bullock v. Battenhausen*, 108 Ill. 28; 11 Brad. 665; *Sims v. Gains*, 64 Ala. 392; *Bryant v. Young*, 21 Ala. 264; *Gregory v. Perkins*, 4 Dev. L. (N. C.) 50; *Holcomb v. Ray*, 1 Ired. (N. C.) L. 340; *Gaither v. Mumford*, 10 N. C. (Taylor's Term), 167; *Benton v. Saunders*, 35 N. C. 360; *North v. Belden*, 13 Conn. 376; *Hough v. Ives*, 1 Root (Conn.), 492; *Friedly v. Hamilton*, 17 S. & R. 70; *Jaques v. Weeks*, 7 Watts, 261; *Dey v. Dunham*, 2 Johns. Ch. 182; *Odel v. Montr se*, 68 N. Y. 499; *Cooledge v. Melvin*, 42 N. H. 510; *Winkle v. Hill*, 9 N. H. 31; *Tifft v. Walker*, 10 N. H. 150; *Smith v. Lowell*, 6 N. H. 67; *Harris v. Sumner*, 2 Pick. 129; *Rice v. Cunningham*, 116 Mass. 466; *Shield v. Anderson*, 3 Leigh (Va.), 729; *Watkins v. Arms*, 64 N. H. 99; *Bentz v. Rockey*, 69 Pa. St. 71; *McCullough v. Hutchinson*, 7 Watts, 434; *Shaffer v. Watkins*, 7 Watts & S. 219; *Connelly v. Walker*, 9 Wright (Pa.), 449.

There is not, for any practical purpose, so far as the validity of the particular transaction is concerned, any difference between fraud in fact and fraud in law; between fraud proved by direct evidence, and fraud inferred by law from facts which are consistent with an absence of actual intent to defraud. The law declares that every man must be presumed to intend the natural and necessary consequences of his own acts; and the court must presume the intention to exist when the prohibitory consequences must follow the act, and will not listen to argument to the contrary. *Sims v. Gaines*, 64 Ala. 392; *McKibben v. Martin*, 64 Pa. St. 352; *Harris v. Sumner*, 2 Pick. 129; *Holmes v. Marshall*, 78 N. C. 262; *Chenery v. Palmer*, 6 Cal. 119;

Weare Commission Co. v. Druley.

Briggs v. Mitchell, 60 Barb. 288; Lukins v. Aird, 6 Wall. 78; Emerson v. Bemis, 69 Ill. 537; Waite's Fraud. Convey., Sec. 9; Bump's Fraud. Convey. (3d Ed.), 362, 579, 603-4.

The courts must presume the intention to exist where the consequences must follow, and will not listen to argument against it. And whenever the effect of a particular transaction is to hinder, delay or defraud creditors, the law conclusively presumes the intent. Lukins v. Aird, 6 Wall. 78; Sims v. Gaines, 64 Ala. 392; Dean v. Skinner, 42 Iowa, 418; Macomber v. Peck, 39 Iowa, 351; Scott v. Hartman, 26 N. J. Eq. 89; Coolidge v. Martin, 42 N. H. 510; Winkley v. Hill, 9 N. H. 29; Shield v. Anderson, 3 Leigh (Va.), 729; Rice v. Cunningham, 116 Mass. 466; Chenery v. Palmer, 6 Cal. 119; Hilliard v. Cagle, 46 Miss. 309; Potter v. McDowell, 31 Mo. 62; Bigelow v. Stringer, 40 Mo. 195; Binford v. Johnson, 82 Ind. 427; Emerson v. Bemis, 69 Ill. 537; Moore v. Wood, 100 Ill. 451; Funk v. Lawson, 108 Ill. 502; Gordon v. Reynolds, 114 Ill. 118; Bump on Fraud. Convey. (3d Ed.), 22-3, 362.

Fraudulent conveyances will be wholly set aside, and will not stand as security even. They will not be held fraudulent in part and good in part. Metropolitan Bank v. Godfrey, 23 Ill. 579; Smith v. Smith, 11 N. H. 459; Harris v. Sumner, 2 Pick. 129; Sidensparker v. Sidensparker, 52 Me. 486; Mackin v. Cairns, Hopkins' Ch. (N. Y.) 373; Graves v. Blandell, 70 Me. 190; Egery v. Johnson, 70 Me. 258; Graham v. Rooney, 42 Iowa, 567; Moore v. Wood, 100 Ill. 451.

GEORGE S. HOUSE and JOHN H. BRECKENRIDGE, attorneys for appellee, Mary A. Druley, administratrix, etc.

BRIEF OF W. S. COY, ATTORNEY FOR JANE DRULEY.

The making of the deed to Jesse Druley, in trust for Jane Druley, was not fraudulent in fact, and will not support an attachment. Shrove v. Farwell, 9 Bradw. 256; Princeton Nat. Bank v. Kuntz, 22 Ill. App. 213.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Omitting what is irrelevant to the questions to be decided, this case is that the appellant commenced September 3, 1890,

an action of assumpsit against William M. Druley and Albert A. Druley, who were brothers and partners, and sued out an attachment which was levied upon land of William.

On the trial the court instructed the jury to find for the defendant on the issue formed upon the attachment. Whether that was error is the principal question.

September 5, 1890, William died, after being sick several months. August 19, 1890, he had executed and placed in the hands of another brother, Edwin, a deed to the land, with instructions to carry it in his pocket, and if William got well return it to him, and if he did not get well to put it on record. William was indebted to his father, Jesse, who had let him have about \$18,000 more than five years before, and on account of that indebtedness had, March 10, 1887, made to his mother, Jane, a note for \$10,000, payable five years after date, with interest at six per cent, payable quarterly. The deed was to Jesse in trust for Jane, and there was no consideration for it other than this indebtedness, and no agreement, unless implied, that the deed should be payment of or security for the indebtedness. The note remained in the mother's possession.

If the deed could have any effect it would probably be as security, but did it take effect at all? Edwin did put it on record September 2, 1890, but that was contrary to his instructions. The intention of William was that it should have no effect during his life; that if he recovered from his then sickness the deed should be returned to him.

It seems difficult to construe such a transaction as amounting to a delivery. *Provost v. Harris*, 36 N. E. 958; *Washburn, Real Property*, Vol. 3, 285 *et seq.*; *Cook v. Brown*, 34 N. H. 460.

In the whole evidence there is not a scintilla that William intended any fraud upon his creditors, but the appellant insists that a deed absolute, which is only security, is fraudulent *per se*, as containing a secret trust—a right to redemption—for the grantor. Such a doctrine is quite inconsistent with the numerous cases in this State permitting redemptions from such deeds; for if fraudulent *per se* the court

would leave the parties where it found them. In the first case cited by the appellant to this point, Metropolitan Bank v. Godfrey, 23 Ill. 579, such a redemption was allowed. It can hardly be disputed that such a deed may be consistent with absolute honesty in the heart of the maker.

Now the doctrine of this court is that the fraud for which an attachment will hold, is fraud in fact; that the debtor intended a fraud. Rhode v. Matthai, 35 Ill. App. 147. We hold that instruction not error.

After the death of William, the plaintiff amended by discontinuing as to Albert and substituting Mary A. Druley, administratrix of William, as sole defendant, and upon her pleas the case was tried. She has assigned some cross-errors upon the judgment against her upon the merits. But as the attachment is gone, and the indebtedness indisputable, and the estate of William insolvent, it is not worth while to treat of them.

We should overrule them if we did. The judgment is affirmed.

Atchison, Topeka & Santa Fe Railroad Company v. Chicago & Western Indiana Railroad Company.

1. INTEREST—*What it is.*—Interest may be defined to be a compensation usually reckoned by percentage for the loan, use or forbearance of money. Interest in actions at law arises from the statute. At common law it was synonymous with usury.

2. SAME—*Vendee of Real Property in Possession—Rents and Profits—Purchase Money.*—The general rule in equity is that a vendee who has taken possession of real property under a contract of sale can not have the rents and profits arising from such possession without paying interest upon the purchase money where it remains in his hands.

3. SAME—*In Equity.*—Interest, in equity, is allowed because of equitable considerations. Equity follows the law, and ordinarily, if it gives interest it does so because, under the statute, the party is entitled to it; but a court of equity, subject to rules of law, gives or withholds the interest as, under all the circumstances of the case and the law applicable thereto, it deems equitable and just.

4. **SAME**—*When a Purchaser Will be Compelled to Pay in Equity.*—Equity considers that which is agreed to be done, as actually performed, and a purchaser is, therefore, entitled to the profits of the estate from the time fixed upon for completing the contract, whether he does or does not take possession; and as from that time, the money belongs to the vendor, the purchaser will be compelled to pay interest.

5 SAME—Delay by Default of Vendor—Purchase Money “Lying Dead.”—If delay is occasioned by the default of the vendor, and the purchase money has lain dead, the purchaser will not be compelled to pay interest. The purchaser must, however, in general, give notice to the vendor that the money is lying dead.

6. SAME—*When Purchase Money is Not Considered as Lying Dead.*—If the money is not actually and *bona fide* appropriated for the purchase, as if the purchaser derives any advantage from it, or in any manner makes use of it, he will be compelled to pay interest.

7. **SAME—The Rule at Law—Money Not Due.**—At law, interest is not recoverable because of the withholding of money which by the terms of a contract is not due, but in contracts for the sale of real property, equity proceeds upon the principle that it is not just for a vendor to have the use and enjoyment of the premises and also the purchase money, at the same time, and consequently allows the vendor to recover interest.

8. **SPECIFIC PERFORMANCE**—*Conveyance Must Correspond with the Contract.*—Where a person entered into a contract with another for the sale of real property conditioned upon the payment of the purchase price to convey the property by a deed with covenants of warranty, the party purchasing is entitled to a deed of conveyance in fee simple, absolute, with covenants of warranty, and without defeasance or qualification, on the payment of the purchase price fixed in the contract. The vendor can not insert in the deed provisions continuing in force or otherwise, giving effect to special provisions of the contract, unless it is so stipulated.

Memorandum.—Bill for specific performance. Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 30, 1894.

STATEMENT OF THE CASE.

Appellant and appellee made a contract, the parts of which, material to an understanding of this case, are as follows:

This agreement made and entered into this day of
 , A. D. 1887, by and between the Chicago & West-
 ern Indiana Railroad Company, a corporation of the State
 of Illinois, party of the first part, and the Atchison, Topeka

A., T. & S. F. R. R. Co. v. C. & W. I. R. R. Co.

& Santa Fe Railroad Company, in Chicago, a corporation of the same State, party of the second part.

Witnesseth: That as a part and parcel of a certain contract of lease about to be completed between the parties hereto, and with other parties, and only on condition that the same is finally completed, executed and confirmed by the stockholders of the party of the first part hereto, the party of the first part agrees to sell to the said party of the second part the following described real estate, to wit:

First: * * *

Second: * * *

The party of the second part agreeing to pay to the party of the first part for the property first above described the sum of two dollars (\$2) per square foot, to be paid as follows:

Whereas, in and by the said lease above referred to, the party of the first part is about to agree with the party of the second part to complete the alignment of its railroad tracks from 49th street northerly to the St. Charles Air Line Railroad, and also to construct a viaduct on 18th street, and to complete four main tracks between Clark street and 49th street, as will more fully appear by the said contract of lease about to be executed between the parties hereto and the Chicago, Santa Fe and California Railway Company and Anthony J. Thomas and Charles Edward Tracy, trustees; the same being the lease hereinbefore referred to.

Now, therefore, it is agreed that the purchase price of the property first above described shall become due and payable upon completion by the party of the first part of its alignment as aforesaid, and of its four main tracks as aforesaid, as far north as 16th street, and the completion and construction of the said viaduct.

Possession of both of the properties above described shall be given by the party of the first part to the party of the second part, upon the said agreement or lease above referred to being confirmed by the stockholders of the party of the first part and fully executed and delivered.

And it is further agreed, that upon the performance of the stipulations of this agreement as to the time when the purchase price of the property first above described shall become due, and a release of the said two mortgages, liens placed on the said property by the party of the first part, and the tender to the party of the second part of a deed with covenants of warranty conveying said property first above described to the party of the second part, the party of the second part shall at once pay the purchase price therefor; it being understood that the party of the second part is satisfied to receive the title now existing in the party of the first part to said several tracts of land, together with releases of all mortgages placed thereon by the party of the first part, and to rely for its title to said property upon covenants of warranty to be contained in such deeds.

It is further agreed, that prompt payment of the purchase moneys at the times herein limited is of the essence of this contract as to the sale of said lands, and if the purchase price named for either or both of said properties shall not be promptly paid at the times herein limited, then this contract to convey any or either of said lands shall be void, and the party of the first part may at any time thereafter declare the said agreement to convey at an end, and by entry or suit, or either at its option, recover the possession of and its estate, and right and possession of said land as if this contract had never existed.

July 5, 1889, appellant not having received a conveyance of the property first described in said agreement, filed its bill for a specific performance, in which, among others, were the following allegations:

And your orators show that in accordance with the provisions of said agreement of the — day of March, 1887, your orator forthwith entered upon the possession of, and has since held and occupied all the property and real estate described in the said contract, both that which is therein mentioned as "first," and that which is therein mentioned as "second." That afterward, about the 17th day of June, A. D. 1887, the Chicago & Western Indiana Railroad Company

having procured releases of the two mortgages mentioned in said agreement, tendered to your orator a deed conveying said property secondly described in said agreement, in fee simple, which deed was duly delivered to and accepted by your orator, and the consideration therefor paid to said Chicago & Western Indiana Railroad Company, as described in said agreement.

Your orator further shows that subsequently, to wit, on or before the first day of January, 1889, the said Chicago & Western Indiana Railroad Company completed the alignment of its railroad tracks and constructed a viaduct on 18th street, and completed its four main tracks between Clark street and 49th street, as prescribed in said agreement, and thereupon said Chicago & Western Indiana Railroad Company became entitled to demand the purchase price stipulated in said agreement for the conveyance of the property firstly described therein, and your orator became entitled to a deed of conveyance therefor in fee simple, absolute, with covenants of warranty, upon release of the two mortgages resting upon said property as aforesaid, which releases, as your orator is informed and believes, said Chicago & Western Indiana Railroad Company could and still can procure without difficulty, by simply applying therefor to the trustees named in said mortgages; that on or about the 1st day of March, 1889, your orator made known to the said Chicago & Western Indiana Railroad Company that it was ready to pay the said stipulated purchase price, and requested that the release of said mortgages be procured, and that a deed of conveyance be made in accordance with said contract. And your orator avers that it then was and has ever since been ready in good faith to pay the full amount of the purchase price of said land as stipulated in said agreement, upon receiving a suitable deed of conveyance therefor. And your orator shows that both the said Chicago & Western Indiana Railroad Company and your orator have agreed that no exception or advantage be taken by either party on account of the failure of said Chicago & Western Indiana Railroad Company to make an actual tender of a

deed, or of your orator to make an actual tender of the purchase price of said land.

But now so it is, may it please your Honors, that the said Chicago & Western Indiana Railroad Company, contriving how to injure your orator and to defraud him of his rights in that behalf, wholly refuses to make or deliver to your orator any such deed of conveyance of said land firstly described in said agreement, as under and by said agreement your orator is entitled to receive, and said Chicago & Western Indiana Railroad Company has hitherto refused and still refuses to make or deliver to your orator any deed of conveyance to said property, except a deed which shall contain provisions whereby the title of said property shall revert to the said Chicago & Western Indiana Railroad Company, or its successors, by way of forfeiture, upon the breach by your orator or its successors of any of the terms, covenants and conditions of said lease. And for so refusing and insisting the Chicago & Western Indiana Railroad Company assigns various unfounded pretenses, all of which actings and doings are contrary to equity and good conscience.

December 12, 1891, appellee filed its answer, in which it admitted the making of the contract as set forth in the said bill, and most of the allegations of said bill, its answer containing, after giving reasons for such position, the following:

This defendant, further answering, says that it has been at all times ready and willing, on payment of the purchase price of said land, to execute and deliver to the complainant a deed with covenants of warranty, conveying said property first described to said complainant, with a suitable provision therein, continuing in force or otherwise, giving effect to said provision of said agreement making the sale of said real estate a part and parcel of said contract of lease.

The cause came on to be heard in 1893. The certificate of evidence filed in said cause contains the following:

Be it remembered that on the final hearing of the above entitled cause, before any evidence was introduced in said cause, counsel for the respective parties made opening state-

ments of the case to the court. That, in the course of the opening statement made for the defendant, counsel for the defendant stated that the defendant would not offer any evidence in support of the allegations of its answer, except the evidence hereinafter set forth; and that, under the pleadings and on the evidence which would be offered, no question would be raised by counsel for the defendant, as to the right of the complainant to a decree of specific performance, requiring the defendant to execute and deliver a deed of conveyance in the form prayed for in the bill, namely, a deed of conveyance in fee simple, absolute, with covenants of warranty, and without any defeasance or qualification, on the payment by the complainant of the purchase price fixed in the contract, and interest thereon from the 1st day of January, 1889; but that the defendant would contend and insist that any decree which might be entered, should provide for the payment by the complainant of interest on the purchase price from said 1st day of January, 1889.

That, after the said opening statements by counsel, the pleadings were read to the court.

That on hearing, the following facts were admitted by the respective parties in open court, with like effect as if duly proved:

1. That the defendant paid the taxes levied for the year 1887, on all the property described in said contract of June 1887, set out in the complainant's bill; and thereafter in the year 1889, the complainant paid all the taxes levied and assessed on said property for the year 1888, and has since paid the taxes levied and assessed on said property for the years 1889, 1890, 1891 and 1892, respectively.

2. That the area of the property first described in said contract is ninety-eight thousand seven hundred and twenty-four and eight-tenths (98,724.8) square feet.

3. That the description set forth in the final decree entered herein is a correct description of the property firstly described in said contract.

That no evidence in addition to said admissions of fact was offered on said hearing by the complainant.

That in addition to said admissions of fact, the defendant gave in evidence on said hearing, also, certain letters between the parties from which it appears that the only difference existing between them out of which this suit had grown was in reference to the form of deed which the appellant was entitled to have. A final decree was entered in the case July 29, 1893. and is in part as follows:

And thereupon, counsel for the respective parties having been heard, and the court being fully advised in the premises, finds that the equities are with the complainant. That on or about the first day of March, 1889, said complainant made known to the defendant, that it was ready to pay the purchase price stipulated to be paid for the property firstly described in said contract, and requested that releases of said mortgages be procured and that a deed of conveyance be made by said defendant. That thereupon a question arose between the complainant and the defendant as to the form of conveyance to which the complainant was entitled. That the complainant demanded that the defendant execute and deliver to it a deed of conveyance in fee simple, absolute, with covenants of warranty, without any clause of defeasance or any limitation or qualification. That the defendant was ready and willing, on payment of the purchase price, to execute and deliver to the complainant a deed with covenants of warranty, conveying said property, with a suitable provision therein, continuing in force or otherwise, giving effect to the provision of said contract, making the sale of said real estate a part and parcel of said contract of lease. That both the defendant and the complainant agreed that no exception or advantage be taken by either party on account of the failure of the defendant to make an actual tender of such a deed, as the defendant was then willing to give, or of the complainant to make an actual tender of the purchase price of said land; and that, down to the time of the hearing of this cause, defendant did not tender to complainant a deed in any other form than that which is above found defendant was willing to make.

And the court further finds that the area of the property

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first described in said contract is ninety-eight thousand, seven hundred twenty-four and eight-tenths (98,734.8) square feet, and that the purchase price therefor, under said contract, is two dollars per square foot, and amounts to one hundred ninety-seven thousand, four hundred forty-nine and sixty-hundredths dollars (\$197,449.60). That the deed which the complainant was and is entitled to receive from the defendant for said premises, is a deed of conveyance in fee simple, absolute, with full covenants of warranty and without any restriction, limitation or qualification, and that the true and proper description of said premises first mentioned and described in said contract is as follows:

(Property hereinbefore described as first.)

The court thereupon decreed that complainant pay to the defendant within ninety days said sum of one hundred ninety-seven thousand four hundred forty-nine and sixty-hundredths dollars (\$197,449.60) with interest thereon at the rate of six per cent per annum from the first day of January, 1889, to the first day of July, 1891, and at the rate of five per cent per annum from the first day of July, 1891, to the date of payment; and that such payment being made appellee should at the same time deliver to the appellant a deed of conveyance of the property in fee simple, absolute, with full conveyances of warranty, and procure and deliver to the appellant good and sufficient releases in law of the said mortgages on said property above described, and also pay the costs of the suit; and that in default of such payment the complainant's bill do from thenceforth stand dismissed out of court with costs to be taxed, and that thereupon appellant surrender the said premises to appellee.

APPELLANT'S BRIEF, EDGAR A. BANCROFT, ELDON J. CASSODAY
AND GEO. R. PECK, ATTORNEYS.

Appellant contended that there is no provision in the contract for interest on the purchase price. If interest is due, it is because the purchase price became due and was not paid. The law providing for interest is merely a rule for the uniform liquidation of damages for the use or unlawful

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withholding of the money of another. It imposes no liability for interest in the absence of a neglect or violation of legal duty—or for the use of one's own money.

Lord Chancellor Thurlow in *Calcraft v. Roebuck*, 1 Ves. Jr. 221, decided in 1790, that where the vendee takes possession before he is entitled to it by the strict terms of the contract, he is bound to pay interest on the purchase price from that day, even though the delay in the execution of the contract was due to the unreasonable claims of the vendor.

The reason of this rule, as repeatedly stated, is that the vendee having obtained, outside the terms of his contract, the possession of the premises, the vendor should have, in like manner, the benefit of the purchase money. But this rule does not apply to cases where the contract itself gives possession, or where there is no provision for interest. *De Visme v. De Visme*, 1 Mac. and G. 336; *Monk v. Huskisson*, 4 Russell's Ch. 122, note a; *Williams v. Glenton*, L. R., 1 Ch. Ap. 206, 211; *Tewart v. Lawson*, 3 Sm. & Gif. 307, 312; *Riley v. Streatfield*, L. R., 34 Ch. Div. 388; *Jones v. Mudd*, 4 Russell, 122; *Leggott v. Met. Ry. Co.*, L. R., 5 Chan. Ap. 716, 719; *Winterbottom v. Ingham*, 14 Law Jour., Pt. II, 298; *Lofland v. Maull*, 1 Del. Ch. 9, 12 Am. Dec. 106; *Lombard v. Chicago Sinai Congregation*, 64 Ill. 477, 486; *Smith's Estate*, *Ralshouse's Appeal*, 152 Pa. St. 102, 104, 25 Atl. Rep. 315.

APPELLEE'S BRIEF, HERRICK, ALLEN & BOYESEN AND OSBORN
& LYNDE, ATTORNEYS.

A party can not, as a matter of right, call upon a court of equity to specifically enforce the performance of a contract for the sale of land, but the exercise of the power rests in the sound discretion of the court, in view of the contract and the surrounding circumstances. *Beach v. Dyer*, 93 Ill. 301.

The complainant is required to make out a much stronger case to support an application for a specific performance of a contract than the defendant is required to show to resist it. *Short v. Kieffer*, 142 Ill. 266; *C., B. & Q. R. R. Co. v.*

Reno, 113 Ill. 43; Chicago Municipal Gas Light Co. v. Town of Lake, 130 Ill. 42; Dentilman v. Gilbert, 140 Ill. 602; Leonards v. Crane, 147 Ill. 52.

This discretion is not a mere arbitrary discretion, but the court in exercising it is governed by the general principles established by courts of equity.

He who seeks equity must do equity.

And a familiar instance of the application of this principle is in requiring the payment of interest as a condition of equitable relief in cases where there is no obligation at law to pay interest, as on a bill filed to set aside a tax sale as a cloud or where usury is set up. Barnett v. Cline, 60 Ill. 205; Mappes v. Sharp, 32 Ill. 13, at 22; Tooke v. Newman, 75 Ill. 215.

Another general principle is that in decreeing specific performance equity considers that which was agreed to be done as having been done, and will place the parties as nearly as possible in the same position they would have been in if the contract had been performed on the day fixed for performance.

The vendee of land who is in possession and is not in default under his contract, is in equity the owner, subject to the lien of the vendor for the unpaid purchase money. And because of this ownership, the vendee in possession has a right to the free use and enjoyment of the rents, issues and profits, so long as he is not in default under the contract. Baldwin v. Poole, 74 Ill. 97; Smith v. Price, 42 Ill. 399; Baker v. Bishop Hill Colony, 45 Ill. 264; Stevenson v. Loehr, 57 Ill. 510; Lombard v. Chicago Sinai Congregation, 64 Ill. 477.

He can create an easement upon any part of the premises, which will be valid and binding, but liable to be defeated thereafter by his default under the contract. Baldwin v. Poole, 74 Ill. 97.

In the same way he may make a valid mortgage of the property, subject to the lien for the unpaid purchase money. Baker v. Bishop Hill Colony, 45 Ill. 264.

And because of this ownership, and without any provision

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in the contract requiring it, it is his duty to pay all taxes assessed on the property. *Stevenson v. Loehr*, 57 Ill. 510; *Miller v. Corey*, 15 Ia. 166; *Forbes v. Purdy*, 69 Mo. 601; *Sherman v. Lavery*, 6 Fed. Rep. 505.

When a deed vesting the legal title is made, it has relation back to the date of the contract. *Schneider v. Botsch*, 90 Ill. 577; *Sutherland v. Goodenow*, 108 Ill. at 537; *Gudgel v. Kitterman*, 108 Ill. 56; *Welch v. Dutton*, 79 Ill. 465.

The rule that the purchaser in possession shall pay interest on the unpaid part of the purchase money will be applied even in cases where the delay arises from the neglect of the vendor, and the purchaser makes no actual profit out of the land. The act of taking possession, said Grant, M. R., is an implied agreement to pay interest; for so absurd an agreement as that a purchaser is to receive the rents and profits, to which he has no legal title, and the vendor is not to have interest, as he has no legal title to the money, can never be implied. (Sec. 1419.) *Fry on Specific Performance of Contracts* (3d Am. Ed.), 649, 651.

So strongly does the court hold to this principle—that a purchaser in possession shall pay interest on the unpaid purchase money, that it will look at any contract which appears to prevent the application of this rule, by the light of this general principle of justice, and, it seems, refuse execution of it where it grossly violates this principle; for a court of equity interposes only according to conscience.

This rule is expressly held in the following English cases: *Fludyer v. Cocker*, 12 Ves. 25; *Powell v. Martyr*, 8 Ves. 145; *Birch v. Joy*, 3 H. L. Cas. 565; *Ballard v. Shutt*, L. R., 15 Chi. Div. 122; *Att'y General v. Christ Church*, 13 Simons (36 Eng. Ch. R.), 212.

And has been uniformly followed in this country. *Selden v. James*, 6 Rand. 464; *Rutledge v. Smith*, 1 McCord, 231; *Brockenbraugh v. Blythe*, 3 Leigh, 619; *McKay v. Melvin*, 1 Ired. Eq. 73; *Breckenridge v. Hoke*, 4 Bibb. 272; *Stevenson v. Maxwell*, 2 Comst. 413; *Steenrod v. W. P. & B. R. R. Co.*, 27 W. Va. 1; *Covell v. Cole*, 16 Mich. 228; *Minard v. Beaus*, 64 Pa. St. 411; *Wilson v. Herbert*, 25 At.

R. 685; Bostwick v. Beach, 105 N. Y. 661; Boyle v. Rowand, 3 Desauss. 555; Lombard v. Chicago Sinai Congregation, 64 Ill. 478, 75 Ill. 271; Phillips v. So. Park Comm'rs, 119 Ill. 629.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellant, while conceding the general rule in equity to be that a vendee who has taken possession of real property under a contract of sale, can not have the rents and profits arising from such possession without, at the same time, paying interest upon the purchase money if it has remained in his hands, insists, with great ability, that this case is to be distinguished from the numerous cases in which such rule has been announced, because of the existence of three things in the present instance, not to be found in any of the cases cited by appellee. These things are, as stated by appellant:

First. That the contract in this case expressly gave the vendee immediate possession of the land and set no limit to the period of that possession.

Second. That the contract did not contain any provision for interest on the purchase price.

Third. That the delay in completing the sale was due solely to the willful and excuseless conduct of the vendor itself.

Interest may be defined to be a compensation usually reckoned by percentage for the loan, use or forbearance of money. Interest in actions at law arises from the statute.

At common law interest was synonymous with usury. Abbot's Law Dictionary; City of Pekin v. Reynolds, 31 Ill. 529; Ill. Cent. R. R. Co. v. Cobb, 72 Ill. 148.

Interest in equity is allowed because of equitable considerations. Equity follows the law, and ordinarily, if it give interest, does so because, under the statutes, the party is entitled to it; but a court of equity, subject to rules of law, gives or withholds interest as under all the circumstances of the case and the law applicable thereto, it deems equitable and just.

The rule as to interest in the case of the sale of real estate is stated in Sugden on Vendors (8th Am. Ed.) 314, as follows:

“Equity considers that which is agreed to be done, as actually performed, and a purchaser is, therefore, entitled to the profits of the estate from the time fixed upon for completing the contract, whether he does or does not take possession of the estate; and as from that time, the money belongs to the vendor, the purchaser will be compelled to pay interest for it, if it be not paid at the day.

But if the delay be occasioned by the default of the vendor, and the purchase money has lain dead, the purchaser will not be obliged to pay interest. The purchaser must, however, in general, give notice to the vendor that the money is lying dead; for otherwise there is no equality; the one knows the estate is producing interest, the other does not know that the money does not produce interest. * *

* But even if a purchaser gave such notice, yet if the money was not actually and *bona fide* appropriated for the purchase or the purchaser derived the least advantage from it, or in any manner made use of it, the court would compel him to pay interest.”

And Fry on Specific Performance of Contracts (3d Am. Ed., Sec. 1419) speaks as follows: “The rule that the purchaser in possession shall pay interest on the unpaid part of the purchase money will be applied even in cases where the delay arises from the neglect of the vendor, and the purchaser makes no actual profit out of the land. ‘The act of taking possession,’ said Grant, M. R., ‘is an implied agreement to pay interest; for so absurd an agreement as that a purchaser is to receive the rents and profits to which he has no legal title, and the vendor is not to have interest, as he has no legal title to the money, can never be implied.’

And the same author at Sec. 1425 states the rule as follows: So strong does the court hold to this principle—that a purchaser in possession shall pay interest on the unpaid purchase money, that it will look at any contract which appears to prevent the application of this rule by the light

of this general principle of justice, and, it seems, refuse execution of it where it grossly violates this principle; for “a court of equity interposes only according to conscience.”

In Sec. 429 of Pomeroy on Specific Performance the rule is stated as follows: “The general rule is well settled that where the contract is not completed until after the time stipulated for that purpose, but the court, nevertheless, decrees a specific performance, it will adjust the equities of the parties by placing them as far as possible in the same position which they would have occupied had the agreement been completed at the prescribed day, and to that end it will allow the purchaser the rents and profits, and to the vendor interest upon the purchase price from and after that date.”

The same author in note 2 to the above section, says: “The vendee is liable for the interest as stated in the text, even when the purchase money has lain all the time in his hands, ‘dead’—that is, unused, idle and producing no interest, income or profit, provided the delay was caused by his default (*Calcraft v. Roebuck*, 1 Ves. 221, *Enraght v. Fitzgerald*, 2 Ir. Eq. Rep. 87), but not when the delay was caused by the vendor’s fault. *Howland v. Norris*, 1 Cox, 59. But even in the last case, if the vendee would escape liability to pay interest, he must actually set aside the money and appropriate it for the vendor, must not in any way derive a benefit from it, and must notify the vendor of these facts, and that the money is thus lying idle. Since if the vendee does not set apart and appropriate the money, or if he derives any benefit from it, he must pay interest, although the delay is the vendor’s.”

Counsel for appellant, while, as we understand, conceding the general rule as above set forth, insist with great force that interest is never given because of the withholding of money which, by the terms of the contract, is not due. Such is undoubtedly the rule at law, and for this reason the case of *Minard v. Beans*, 64 Pa. St. 411, the facts of which were in many respects analogous to that of the present case, was rightly decided; the court holding that although the defendant had taken possession before the money became due, he

could not be held to pay interest from the date of taking possession, because interest at law is not allowable on money, the payment of which is not due.

Equity proceeds upon the principle that it is not just for a vendor to have the use and enjoyment of the premises and also to have the use of the purchase money, and consequently it in many cases allows the vendor to recover interest, although the non-payment of the purchase money may have been caused by his fault; but a court of equity will never do this if the allowing of such interest seems to it inequitable. As, if the payment of the purchase money was withheld because the vendor failed to make such title as he had agreed to convey, or fail to present such an abstract of title as he had agreed to furnish, in such cases courts of equity have refused to require the vendee in possession to pay interest. It is to be observed in respect to such cases that not only was the vendor at fault, that is, had failed to comply with the terms of his contract, but there was nothing that the vendee could do to relieve himself from the situation. He could not tender the purchase price, because the title not being shown to be good by making such tender, he would have run the risk of losing his money. In the present case it is recited in the contract that the vendee is satisfied to receive the title the vendor then had, with releases of mortgages placed thereon by the vendor, and to rely for its title to the property upon covenants of warranty to be contained in the deed.

There has, therefore, in the cause under consideration, never been any question of title. Appellant could with entire safety at any time have relieved itself from the payment of interest by making a tender of the contract price, and keeping such tender good. Or it could have deposited such money in some suitable place for the use of the vendor.

We do not regard the three distinguishing features, said by appellant to exist in this case, as sufficient to take the case at bar out of the general rule existing in equity in respect to the payment of interest. The contract did give to the vendee immediate possession, and it failed to provide

for the payment of interest upon the purchase price, because such payment was made to depend upon the doing of certain things by the vendor, and it was when those things were done that the purchase money was to be paid. Those things having been done, the purchase money became due, but contemporaneous with the payment of such money the vendor was to make a deed with full covenants of warranty. The vendor refused to make such deed, and, consequently, could not in any action at law have recovered interest upon the purchase money. While, however, such refusal on the part of the vendor was willful and may be said to have been inexcusable, yet it was not in any sense wicked or fraudulent.

The vendor seems to have acted in perfect good faith, and upon what it honestly understood were its rights. If, therefore, the vendor for all the time during which it ought to have been in the possession and enjoyment of the purchase money is not to receive interest thereon, and the vendee, while having had during this period the use and enjoyment of the land, is to be allowed to retain the interest which it is presumed to have made on the purchase money, the spectacle will be presented of a court of equity punishing the vendor for in good faith acting upon a misconception of its rights, and rewarding the vendee because of such misconception, when at the same time it is not shown that the vendee has suffered any loss because of such conduct on the part of the vendor.

The vendee in this case is not required to pay interest because of any default upon its part, for it has not been in default; but it is made to pay that which it is presumed to have earned upon the purchase money remaining in its hands.

A court of equity regards the rights of the parties as if those things agreed to be done had been done, and when under a contract of sale of real estate the time for the delivery of possession and payment of the purchase price has arrived, thenceforth the land is treated as belonging to the vendee, and the receipts and profits thereof, by whomsoever

received, as being held for his use; while at the same time the purchase money is considered as being the property of the vendor, and the interest earned thereon, or that which it is presumed was earned thereon, is treated as belonging to the vendor. In the present case the vendee has had the rents and profits of the property purchased by it, and the vendor is given the interest presumed to have been earned by the purchase money held these years by the vendee.

It is quite true, as is urged by the vendee, that by the terms of the contract this purchase money has not been due because of the failure of the vendor to execute such a deed as it contracted to deliver. The purchase money was not due, not because a date fixed in the contract had not arrived, but merely because the instrument which vested the legal title in the vendee had not been executed by the vendor. The question presented in the present case is not, has the vendor so complied with the terms of the contract as to the execution of a deed that the money coming to it is due, but what, under all the circumstances and the rules of law applicable to this case, is it equitable should be done.

Had the vendee shown that in consequence of the refusal of the vendor to make such a deed as it contracted to deliver it, the vendee had suffered a loss, the chancellor undoubtedly would, in making his decree, have allowed to it compensation for such loss. So too, if it had appeared that the rents and profits of this property for the period during which the vendor was improperly refusing to make a deed were less than the interest presumed to have been earned upon the purchase money, the chancellor would not have allowed to the vendor interest in excess of such profits; for the vendor can not, by his default, whether willful or arising from circumstances beyond his control, either make a profit to himself or compel the vendee to sustain a loss. *Jones v. Mudd*, 4 Russ. 122; *Esdale v. Stevens*, 1 Sim. & Stu. 122; *King v. Ruckman*, 24 N. J. Eq. 556; *Leggott v. Metropolitan R. W. Co., L. R.*, 5 Ch. App. 716.

Counsel for appellant urge that as the contract provided that appellant should have immediate possession of the land

in question, some consideration must have been given by appellant for such agreement, and that the decree of the court allowing interest to appellee, the vendor, is in effect to deprive the vendee of the benefit of the plain provision of a contract, for which provision it must be presumed to have given an adequate consideration.

The contract between the parties did indeed provide that the vendee might go at once into possession of the premises sold, and that the vendor should proceed to make certain improvements upon said premises and procure the release of certain incumbrances thereon, and when this had been done the purchase price was to be paid, a deed being at the same time given by the vendor. It was not, so far as appears, however, contemplated by either of the parties, that a misunderstanding between the vendor and vendee would arise as to the form of the deed to be made by the vendor, and the contract contains no provision as to what the rights of the parties should be as to rents, profits and interest in case of such misunderstanding, and a delay in the making of such deed, consequent thereon.

We are therefore called upon to consider the rights of the parties in respect to a condition of affairs not contemplated when the contract was made and not provided for in that instrument. At this juncture we do, indeed, look at the contract to determine what was the duty of each of the parties, and what their obligations and situation toward each other were, and having so done, the general principles of equity applicable to such a state of affairs as is found to exist, must control in respect to the payment of interest. A general principle of equity is, that a vendee can not at the same time have the rents and profits of the property sold and also the use of the purchase money, and this, although the failure to pay the purchase money may have been owing to the fault of the vendor; provided, nevertheless, that the vendee may, by making a tender of the purchase money and keeping the same good, relieve himself from the burden of interest; and provided, also, that if the situation of affairs was such that the vendee could not with safety make such

tender, or if the vendee, on account of the default of the vendor, has sustained a loss, or if the rents and profits of the property are not equal to the interest, that the vendee will not be required to pay anything, or at least not such an amount as that the vendor, by reason of any duty omitted or fault committed by him, shall make a profit.

It is quite true, as appellant contends, that the meaning of contracts does not depend upon the party who asks for their interpretation. What we are concerned with at present is not so much the meaning of the contract as the situation that arose and exists in consequence of a misunderstanding not contemplated when the contract was made. The action of the court in awarding to the vendor that which it could not have obtained in an action at law, is no different from that which a court of equity does in many cases, as, in the familiar instance where the property of a party has been sold for taxes, the purchaser can not, in an action at law, compel the owner to refund to him the amount he has so paid; it is not owing by or due from the owner; while if the owner file a bill to remove the cloud created by such sale, a court of equity will, as a condition of such removal, require such purchaser to pay not only the amount of the taxes for which the property was so sold, but also interest thereon.

Substantially, it is now conceded that the interpretation put upon the contract by the vendee was right; and if the court was of the opinion that the vendor had, in insisting upon a different interpretation, acted in any way in bad faith, it would not allow to the vendor the interest which has been awarded. Under the circumstances, the vendee not being shown to have sustained any loss on account of the default of the vendor, it not being claimed that the rents and profits are not equal to the interest presumed to have been earned upon the purchase money, although the vendor was wrong in its interpretation of the contract, yet, having acted in good faith, a court of equity will not inflict upon it the punishment of losing the rents and profits of the estate it had sold and given possession of, and also the interests presumed to have been earned by the purchase money.

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The court has taxed the costs in this case against the vendor and it might, perhaps, have properly insisted that as a condition of the allowance of interest the vendor should pay a reasonable sum as a fee for the necessary employment of solicitors by the vendee. This has been, however, not seen fit to do, and we see no sufficient reason for interfering with its discretion in this regard.

The decree of the Circuit Court is therefore affirmed.

Chicago City Railway Company v. Peter Smith, Administrator of the Estate of Margaret B. Smith, Deceased.

1. NEGLIGENCE—*A Question of Fact.*—Negligence is a question of fact for a jury. Not only are the specific acts which are alleged to be negligent to be proved to the jury, but whether, if proved, they were negligent, is for the jury, and not the court, to determine.

Memorandum.—Death by negligent act. Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed June 18, 1894.

WM. J. HYNES, attorney for appellant.

CONSIDER H. WILLETT and C. PORTER JOHNSON, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

A span of horses with only the harness on, being driven out of the barn of the appellant, the driver struck one of them with the lines, and the horses ran away, running over and so injuring the mother of the appellee that she died, and this action is by him as administrator. At the instance of the appellee the court instructed the jury:

“The jury are instructed, as a matter of law, that if they find from the evidence that Gunning was the defendant’s servant, and that changing the horses by driving them with

nothing but a harness on in a slippery street, where the snow had just fallen, and in all of said acts he was doing as permitted by the defendant, and in so doing in fact exercised ordinary care, yet if the jury find from the evidence that Gunning slapped the off horse with the lines without any cause, which act caused the team to run away, and Gunning to slip and fall so that the team ran away, and said Gunning, then using ordinary care, lost his hold of the lines, and did in every respect use ordinary care, except slapping the off horse with the lines, and by such act causing the team to run away, yet the jury must find for the plaintiff.

The court instructs the jury as a matter of law, that if they find from the evidence that when a team ran away, it was the custom of defendant at its 20th and State street barn to mismate or break up the runaway team by putting each runaway horse with another horse, and so make new teams, and if the jury finds from the evidence that the team in question had run away in February previous, and had not been separated as was such custom with runaway teams, and if the jury further find that the neglecting to observe this custom caused the team to run away upon the occasion in question, the jury will find the defendant guilty.

The court instructs the jury, as a matter of law, that if they find from the evidence that Gunning could, with ordinary efforts, have raised a hue and cry, which would have attracted the attention of Margaret B. Smith, that a runaway team was in the street, and if the jury further find from the evidence that if he had done so it would probably have prevented the injury, and that he neglected any hue and cry whatever, the jury will find the defendant guilty.

The court instructs the jury, as a matter of law, that without regard to what fact may have caused the horses to run away, if they find from the evidence that after the horses did run away that Gunning did not use ordinary care to stop them, and if the jury find from the evidence that it was for the want of ordinary care on the part of Gunning that the horses became loose, and if the jury further find that if Gunning had kept hold of the lines, he would by the use of

ordinary care have prevented the injury to Margaret B. Smith, deceased, then the jury will find for the plaintiff.

The court instructs the jury, as a matter of law, that if from all the evidence in the case, they are in doubt as to what caused the team to run away, and if they find from the evidence that Gunning did not use ordinary care in driving teams generally, which fact was known to the defendant, and if they further find that the team ran away through want of ordinary care by Gunning, the jury will find for the plaintiff."

The appellant excepted, and judgment being entered against it, appealed, and now assigns as error those instructions.

It must be borne in mind that a court knows no more judicially about managing horses, refractory or otherwise, than it does of navigating a steamship in a storm upon the Atlantic; also that negligence is a question of fact for a jury. Not only are the specific acts which are alleged to be negligent to be proved to the jury, but whether, if proved, they were negligent, is for the jury and not the court to determine. *Chicago & N. W. Ry. v. Bouck*, 33 Ill. App. 123; same v. Frazes, *Ibid.* 307.

We might be tempted to affirm the judgment notwithstanding the error committed by the judge in telling the jury how to manage horses, and we mean not to impugn his skill, on the ground that justice was done, were it not for the case, *North Chicago St. R. R. v. Louis*, 138 Ill. 9, where our effort in that direction in the same case, 35 Ill. App. 477, was defeated for an error less serious.

The judgment is reversed and the cause remanded.

A. P. Gilmore v. Thomas E. Courtney.

1. BUILDING CONTRACT—*Architect's Certificate*.—Under a building contract providing that all questions of damages, allowance for extra work or work left out, and all questions as to the true intent and meaning

of this contract shall be referred to an architect as arbitrator, and his decision be final and binding to both parties, the contractor must have the certificate of the architect, or a legal excuse for not having it, in order to maintain his action.

2. INSTRUCTIONS—*Ignoring Evidence*.—In an action upon a contract, where the defendant claims damages for delay by the appellee, for bad work, and for deficiencies in performance, and there is some evidence tending to show such damages, an instruction which cuts off consideration of damages for such work and deficiencies, is erroneous.

Memorandum.—Assumpsit on building contract. Appeal from the Superior Court of Cook County; the Hon. GEORGE F. BLANKE, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed June 18, 1894.

COLLINS, GOODRICH, DARROW & VINCENT, attorneys for appellant.

GEORGE P. MERRICK, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

July 15, 1889, these parties made a written contract under which the appellee was to do the excavating and mason work of a house for the appellant, and complete the work by October 1, 1889. The appellant was to pay "upon certificate of H. B. Seeley, architect, that all the terms of the contract have been complied with," and one article of the contract was:

"It is mutually agreed that all questions of damages, allowance for extra work or work left out, and all questions as to the true intent and meaning of this contract shall be referred to H. B. Seeley, as arbitrator, and his decision shall be final and binding to both parties."

That under these stipulations, the appellee must have a certificate of the architect, or an excuse for not having it, in order to maintain his action, is not denied by the appellee. He did not fully complete his work, and quit it about December 1, 1889, as the jury found. He had no certificate, and the only excuse offered is that on the first application for a partial payment under a provision of the contract for such payments, "at the discretion of the architect," the

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architect required of the appellee a "statement," in conformity with section 35 of the mechanics' lien law, as it then stood under the amendment of 1887, since wholly changed. The appellee objected that he was not required by other owners to present such a statement, and there is testimony that the architect expressed himself vigorously that he was in favor of the appellant and opposed to everybody else. This interview was months before the appellee left the work, in fact within three weeks of its commencement.

There is testimony that the appellee then said to the appellant, that there was one understanding upon which he, the appellee, could do the work, and that was that if they should have any misunderstanding when the work was completed the whole matter should be arbitrated, to which the appellant agreed.

The court left the question to the jury upon instructions asked by both parties, whether the language used by the architect would reasonably justify the appellee in believing that the architect would not decide fairly, and if not, whether the provision for submitting to his decision was waived by the appellant.

We will not review the evidence upon which the jury, by a verdict for the appellee, must have found in the affirmative upon one or the other of those questions. The judgment must be reversed for an error in the last instruction for the appellee. That instruction told the jury, that if there was such a waiver, "the plaintiff is entitled to have and recover in this case for the balance of the contract price and the cost of the extra material and labor, and damages for delay, as the evidence in this case shows such balance on said contract, extra labor and material and delay was fairly and reasonably worth, less damages, if any, caused by plaintiff's delay, if from the evidence they believe he has caused any delay."

The appellee claimed damages for being delayed by other contractors, for extras, and for work under the contract, but conceded that the contract was not fully performed.

The appellant claimed damages for delay by the appellee, for bad work, and for deficiencies in performance.

These claims of the appellant were supported by, we may say, at least, some evidence. The instruction cut off consideration of damages for bad work and deficiencies. We could not ourselves figure out how much the appellant lost by it, but the argument of his counsel leads us to conclude that the verdict for \$1,550 should have been \$902.22. If the appellee will remit to the latter sum within ten days the judgment will be affirmed for that, if not, the judgment will be reversed and the cause remanded. In either event the costs fall on the appellee.

MR. JUSTICE WATERMAN.

I am not satisfied that under the evidence appellee was entitled to recover, in the absence of a certificate from the architect.

Daniel H. Tolman v. Thomas W. B. Murray.

1. FRAUDULENT REPRESENTATIONS—*Negligence and Inattention*.—The law will not extend its protection to those who, through negligence or inattention to their business, suffer an advantage to be taken of their credulity.

2. SAME—*Relief in Equity*.—It is not for every losing bargain that a court of equity will interpose its relief. It is only such representations as a man of ordinary prudence will be likely to rely upon, which can be a ground of relief in equity.

3. SAME—*Must be of Existing Facts*.—Fraudulent representation in sales must be of existing facts, material to the value of the thing bought, and not mere prophesy.

MR. JUSTICE WATERMAN, dissenting.

4. VENDOR AND VENDEE—*Statements as to Value*.—Statements as to value of property are not as a rule representations of such a nature that a vendee can rely thereon, and hold the vendor to make the same good. To this rule there are exceptions, as, in the sale of goods by an expert, statements in respect to them and their value, made to one whom the vendor knows to be unacquainted with such value, and whom he is aware relies upon the truthfulness of such statements, are representations which the vendor is bound to make good.

5. SAME—*Ignorance of the Vendee Known to Vendor*.—Where the vendee is wholly ignorant of the value of property and the vendor

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162s	417
54	420
108	825

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knows this, and also knows that the vendee is relying upon his representations as to the value, and such representations are not a mere expression of opinion, but made as statements of facts, which the vendor knows to be untrue, such statements are representations by which the vendor is bound.

Memorandum.—Bill for relief. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1894. Reversed and bill dismissed. Opinion filed June 2, 1894.

MOSES, PAM & KENNEDY, attorneys for appellant.

WEIGLEY, BULKLEY & GRAY, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT. Condensed, the appellee's version of this case amounts to this:

The parties became acquainted in 1887.

The appellant was president of the Chicago Trust and Savings Bank, from which appellee had borrowed \$1,000, which was yet unpaid, when the appellant called upon the appellee and told a flattering tale. What rate of interest was paid on that \$1,000 we fail to find; but as subsequent transactions seem to have been in substance on the basis of two and one-half per cent per month, probably that was the rate.

To present the case of the appellee in its best aspect, we copy from the brief of his counsel:

“The record shows that several times, at least three, prior to the completion of the sale, Tolman went to see Murray. He went to see him at his place of business in Chicago. Except as informed by Tolman, Murray had never heard of the Midland company, and he knew nothing about the value of its stock, its organization, its objects or its purposes. Tolman was the president of the Chicago Trust and Savings Bank, a bank so far as Murray then knew, in good standing, and here is what Murray says with regard to the conversation:

I had three or four conversations, running over a period of three weeks, in April, 1888, in my office in Chicago. The

first time he said to me he was getting up a company to enable business men like myself, and others whose names he mentioned, who had to borrow money on short time, to borrow that money at the same rate of interest as bank interest—six per cent; and he said he was getting up this company or guarantee fund; that it was a kind of mutual company on the order of building and loan associations; that is, that all members could borrow at this low rate; that is; that a member had to be a member of the company to borrow at all. And then he went to work on paper to show me how I would be able to borrow at this low rate of six per cent, although I paid one per cent a month to the Midland company for guaranteeing the note, and that his bank, the Chicago Trust and Savings Bank, or any other bank in the city, would discount the note after being guaranteed by this Midland company.

Q. Can you state any of the elements that entered into the computation?

A. No; I would not undertake to figure out how he made it come out. He figured it out to my satisfaction that it was feasible, and I told him at the same time that I didn't need to go into it; that I didn't need to borrow money in that way; I could get all the money I needed at my bank. Then he said it was a profitable investment any way; that there were other men in it that did not need to borrow money. He mentioned some names; one was Joseph Stockton. I knew him and had known the firm for years, and that gave me confidence. He mentioned three or four furniture men in the city that I knew; one was Cogswell, on the west side, and another one was on Randolph street, and one by the name of McDonald. These were men I knew personally. He told me that it was a good investment, because it would pay twenty-five per cent dividend on the money invested. He figured it up, but I can't figure it. He said it would at any rate give twenty-five per cent.

He said he was getting up a company, and showed me a list of names he had. He was then the president of the bank. He said the stock was well worth all that I was paying for

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it; I paid \$1,500; ten shares, \$150 a share. He said I could sell it for that if I got tired of my bargain; that he himself would buy it back at that figure. He has promised that twice since. That is all that I remember. He said the business of the Midland company was to guarantee the notes of its members, so that they could borrow money at a low rate of interest. Afterward we had another conversation, when I found that they were paying no dividends. It was near meeting time, and when they decided they couldn't pay the dividend I wanted to sell my stock. He said, come in the spring and I will buy it of you. He said he had all the Midland stock he wanted to carry then. I went in the spring, but he refused to buy. I offered to give him my stock at \$1,500, to pay off the two notes that he had against me in the bank, and \$500, \$2,000 in all. I was willing to forego the interest if he would take the Midland stock. He refused to accept. Six months after the issuance of the stock I had a talk with him; I asked him at the bank how the Midland company was getting on, and he said well, and would pay twenty-five per cent dividend. That was all. My notes were not all paid then."

Again: "In all the renewals my transactions were carried on with Tolman at the bank; I believed what Tolman said, or I would not have gone into it at all; I didn't know anything of the Midland company, except what Tolman told me."

On cross-examination he said: "When Tolman called on me to join the Midland company, it was without prior arrangement. I did not meet him on the street, and I didn't ask him to call at any time. When he called he said he was getting up a company to accommodate such men as me needing money on short time, on the mutual principle of building and loan associations. He called two or three times afterward; the last time I agreed to take stock. These conversations took up about three weeks. I made no examination in reference to the Midland company; I took Tolman's word."

"Q. Then the question of paying twenty-five per cent

dividend, the amount they would pay, was just as open to you as to him, wasn't it? A. I supposed that he would know more about it than I would; I made no inquiry; he figured out what he could do and would do; I was satisfied with the figures he made, but I don't remember how he did it; I took his say-so for it; he persuaded me to join the company, and I believed what he said; I supposed him to be the biggest stockholder; I know it was a company organized for the purpose of guaranteeing commercial paper of its members, as it was represented to me."

George T. Thompson, the book-keeper of Murray, testified: "I am book-keeper for Murray & Company, or Mr. Murray; I know Tolman since I saw him in the office of Murray & Company, two or three times when he talked to Mr. Murray; the last time he was there Murray called me and said: 'Now, Mr. Tolman will show you how this is figured out.' Murray told me about this before; I went to the desk where they were sitting; he had a pencil and a piece of paper, and said: 'You know how the building and loan associations work; the idea is like this: there is a number of people get together and become members; we loan this money to the members, and then it comes back ultimately;' he said they were profitable, yielding generally about twenty-five per cent; in that way it is quite profitable; the payments come quite reasonable, so you do not notice it. He said, if you are a member of this, it does not cost you any more to borrow money than the ordinary bank rate of interest; he said of course it was very profitable, and like building and loan associations; I did not hear all the conversation at that interview; Murray had quite a conversation before and after."

The foregoing is some of the evidence directly upon the question of the fraudulent statements and representations by which Murray was induced to purchase the stock. There is much other evidence in the record corroborating this which space forbids us quoting here.

The Midland company was chartered, as expressed in its articles, "to secure information and furnish statements concerning the responsibility of persons and corporations, to

conduct a merchandise commission business, and to contract in respect thereto." The application was filed with the secretary of state, March 7, 1888, and the certificate of incorporation was filed July 26, 1888.

It seems hardly credible that on this showing a manufacturer on a scale that required a book-keeper, in business in Chicago for twenty-two years, could have been induced to buy at \$150, shares in a company as yet unorganized.

Without commending the morality of their exercise, we do not disguise our admiration of the fascinations of the appellant.

The whole case of the appellee, upon which he has obtained a decree which was intended to be one of rescission and restitution, stands upon the hypothesis that he was defrauded by false and fraudulent representations, and that hypothesis is based upon the assumption that in effect the appellant told the appellee that the Midland company was what it was not, *i. e.*, a company organized—chartered—to guarantee commercial paper. All other supposed deceit is but prophecy.

First, the appellant made no such representation. On the appellee's own testimony the representation was that the business of the Midland company was to guarantee the notes of its members; and he adds as a summing up, "I knew it was a company organized for the purpose of guaranteeing commercial paper of its members, as it was represented to me," which is not a statement of what the representation was, but of what he knew from it. The representation of what the business of the company was, or, as the appellee seeks to have it understood, for what purpose it was organized, is no representation of what the charter is.

It is an ambiguous statement which the appellee has no right to rely upon as but of one construction. And even these representations, though expressed—if they were—in the present tense, related not to what existed then, but to what was going to be. They may have been promises, but are not statements of facts existing then. *Hallows v. Fernie*, L. R., 3 Ch. App. Ca. 467, 475.

Second, it is clear that a good charter, bad charter, or no

charter was of equal value to a company which proposed a profit by guaranteeing payment by borrowers who had not such credit or collaterals as warranted confidence by bankers in the promises to pay of such borrowers.

Loss in such business, if conducted in good faith, was inevitable.

If all the borrowers for whom the company would become liable, were to be members of the company, as the appellee says the appellant told him, and all the members were borrowers in the ratio of their stock, where would be the profit even if all paid?

Third, the misrepresentation was not such that care and prudence could not have provided against the deception; "the law will not extend its protection to those who, through negligence or inattention to their business, suffer an advantage to be taken of their credulity." *Cooke v. School Com.*, 1 Gilm. 537.

"It is not for every losing bargain a court of equity will interpose to relieve." *Tuck v. Downing*, 76 Ill. 71.

Only such representations as a man of ordinary prudence would be likely to rely upon, can be a ground of relief. *Grier v. Peterbaugh*, 108 Ill. 602.

In *Hicks v. Stevens*, 121 Ill. 186, where the representations were as to an invention of an improvement in boilers, which case is relied upon by the appellee, the court say: Hicks was the inventor, and claimed to have made thorough tests of his invention, and presumably, had a greater knowledge of its use, capabilities, utility and value than any other person.

From these facts, and his profession of friendship to Jones, and of his desire to put him into a good paying business, we think Stevens and Jones not only relied upon the representations, but had a right to rely upon them, in making their purchase. There, by construing the representations as stating results already proved by experience, the representations were of existing facts, material to the value of the thing bought. No such element is here present.

An English judge expressing his surprise that people could

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be taken in by such simple devices as a witness, a jockey, described, was answered by the jockey: "My lord, there is a fool born every minute, and, thank God, most of them live."

The law can not take care of them. *Wightman v. Tucker*, 50 Ill. App. 75.

The decree is reversed and the bill dismissed as to the appellant with costs.

MR. JUSTICE WATERMAN, DISSENTING.

If the only evidence in this case was that referred to in the opinion of the majority of the court, I should agree with the conclusion arrived at.

The findings of the master are sufficient to sustain the decree entered by the Circuit Court. The question before us is whether the evidence justifies such findings.

It appears that in 1885, appellant was the president of the Chicago Trust and Savings Bank, which bank had a capital of \$200,000, of which appellant took \$150,000, paying for it in cash; that in the fall of 1886 the stock was doubled, each stockholder being given two shares for the one he already held; that in 1886 appellant and some others conceived the idea of organizing a corporation whose business it should be to guarantee commercial paper; that appellant and others made an application to the secretary of state for a charter for a corporation authorized to guarantee commercial paper.

The secretary of state refused to issue such charter, whereupon a corporation known as the Midland company was organized by appellant. The object in the certificate of organization of said corporation, being stated to be to secure information and furnish statements concerning the responsibility of persons and corporations, to conduct a merchandise commission business, and to contract in respect thereto.

Appellant had before the organization of said Midland company, according to his own testimony, sold most of the stock thereof for \$150 per share, being an advance of \$50 upon the par value.

Appellee and about one hundred others were induced by appellant to subscribe their names to a paper reading as follows:

"The Midland company having been established, with a capital stock of \$100,000, divided into 1,000 shares, we, the undersigned, hereby subscribe for and agree to purchase of D. H. Tolman the number of shares of stock of said company set opposite our respective names, paying therefor \$150, and take delivery at the Chicago Trust and Savings Bank, May 5, 1888."

Appellee agreed to take said stock some time in April, 1888, and in the early part of May actually received from appellant certificates for ten shares of stock, giving to appellant his, appellee's, check for \$150 and nine notes, each for the sum \$150, payable in from one to nine months from date, and bearing interest at the rate of eight per cent per annum.

Appellant told appellee, in order to induce him to subscribe and take said stock, that the stock was worth \$150 per share, and that the Midland company was organized for the purpose of guaranteeing commercial paper.

The Midland company was organized in May, 1888. Appellant subscribed for \$50,000 of the stock, Floyd E. Jennison for \$20,000, Messrs. Douglass, Brown and Werner for \$10,000 each, and the stock was issued in accordance with the subscriptions to the respective subscribers.

This entire subscription was paid by appellant, and he, so far as Messrs. Jennison, Douglass, Brown and Werner were concerned, was the owner of all the stock, and appears always to have managed and controlled the Midland company entirely as he saw fit.

Very shortly after it was organized the Midland company purchased from the Trust and Savings Bank, of which appellant was the president, \$50,000 of its stock, paying \$62,500 therefor; this stock was then paid up to the amount of about sixty per cent of its par value.

Appellant seems to have sold, within two or three weeks, to about 125 different parties, nearly the entire stock of

the Midland company, in lots of from five to ten shares each, for \$150 per share, such sales, as he himself testified, being made principally before the organization of the company; so that by the mere organization of the company he seems to have made a profit of about \$50,000, selling all of the stock but about ten shares retained for himself, and, as is testified by the cashier of the Trust and Savings Bank and one of the directors of the Midland company, Mr. Jennison, appellant has, by purchasing and selling from time to time the stock of the Midland company, made a profit of from \$150,000 to \$200,000.

The Midland company charged one per cent per month for guaranteeing commercial paper, and the only paper that it guaranteed, save in one or two instances, was that upon which loans were made either by appellant or by the Chicago Trust and Savings Bank.

The Midland company for purposes best known to appellant declared several small dividends, but appears now not only to be insolvent but to have lost its entire capital.

I quite agree with the opinion, in part expressed by the majority of the court, that appellee did not use that care and caution which a prudent man who did not rely entirely upon the truthfulness of the statements made by appellant, would have used in purchasing the stock of the Midland company. Appellee does not seem to have made inquiry of any person as to the truthfulness of the statements made to him by appellant. The reason for this is apparent. Appellee had business relations with appellant. Appellant well knew that appellee trusted and relied upon him as a prominent business man at the head of a large financial institution, as the prospective organizer, president and principal stockholder in another large financial institution about to be organized, and at the time appellee paid his money and gave his notes for the stock of the Midland company, already organized, so far as the receiving of authority to incorporate and the making of a complete subscription to the stock was concerned, and that appellant was in a position to know what the value of the stock of the Midland company was, and of

necessity had a knowledge as to the value of such stock which no other person could obtain, except with the consent and by the assistance of appellant; appellee, therefore, in taking this stock, did as the ordinary business man, if he took the stock at all, would have done, viz., he took it relying upon the truth of what its president, organizer and principal stockholder said as to its value.

That the stock of the Midland company was worth upon its organization, or when appellee purchased, a premium of \$50 per share, I do not understand is contended by appellant.

Appellant well knew in selling this stock to appellee that appellee was buying it relying entirely upon the truthfulness of his, appellant's, statements as to its value, and the purposes for which it was organized, and he knew such statement was false.

While it is undoubtedly true that as a rule statements by a vendor as to value are not representations, of a nature such that a vendee has a right to rely thereon, and can hold a vendor to make good the truth thereof, yet to this rule there are well recognized exceptions, as, in the sale of goods by an expert in respect to them and their value, representations made to one whom the vendor knows is not acquainted with the value of the article, and whom he is aware relies in purchasing upon the truthfulness of the story as to value told to him, is a representation which the vendor is bound to make good. So, too, where the vendee is wholly ignorant of the value of property and the vendor knows this, and also knows that the vendee is relying upon his, the vendor's, representations as to value, and such representation is not a mere expression of opinion, but is made as a statement of fact, which statement the vendor knows to be untrue, such statement is a representation by which the vendor is bound. *Pomeroy's Eq. Juris.*, Secs. 878, 879; *Pickard v. McCormick*, 11 Mich. 68; *Simar v. Canady*, 53 N. Y., 298, 306; *Henry v. Waldron*, Supreme Court of Rhode Island, *National Corporation Reporter*, January 16, 1894, page 312; *Allen v. Hart*, 72 Ill. 104; *McClellan v.*

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Scott et al., 24 Wis. 81, 87; Maxsted v. Fowler, 53 N. W. Rep. 921; Griffin v. Farrier, 32 Minn. 474; Townsend v. Cowles, 31 Ala. 428; Derrick v. Lamar Ins. Co., 74 Ill. 405; Bigelow on Fraud, page 496; Haygarth v. Wearing, L. R., 12 Eq. Cas. 320; Stover v. Wood, 26 N. J. Equity, 417; Prewett v. Trimble, 17 South W. Rep. 356.

As to the representations made by appellant concerning the purposes for which the Midland company was organized, this may be considered either as a statement of fact or as a statement of law. If meant as a statement of fact, it was untrue, because, to the knowledge of appellant, no permission or authority to guarantee commercial paper was contained in the authority to organize. If meant as a statement of law, and if appellant thought that under the authority granted by the State, the company would have power to guarantee commercial paper, still it was his duty in telling appellee the purpose for which said company was organized and the business it was to do, to tell him the entire truth, viz., that while appellant himself, as he claims, thought it could do such business, yet, the authorities of the State had distinctly refused to give him authority to organize a company, one of the objects of which was stated to be the guaranteeing of commercial paper. It is quite likely, if appellee had been told this, he might not have placed the implicit reliance he did upon appellant's statement as to what business the Midland company was authorized to do and would engage in.

Occupying the position and having the knowledge in this regard, which appellant did, it was his duty, when asking appellee to take stock, if he told him anything concerning the purpose for which the Midland company was organized and the business it would do, to tell him the entire truth. Moreland v. Atchison, 19 Tex. 303; Kerr on Fraud, page 90; Broadwell v. Broadwell, 1 Gil. 699.

The circumstances attending the organization and sale of the stock of the Midland company were so peculiar, the business it did so anomalous, its career so profitable to appellant and disastrous to the more than a hundred indi-

viduals whom he induced to take small amounts of its stock, its relations to the Chicago Trust and Savings Bank, of which appellant was the president and the largest stockholder, were so close, while, at the same time, from beginning to end, the management of this Midland company was so completely in the control of appellant, that I am led to the conclusion that the evidence sustains, for the most part, the conclusions of the master, and that the Midland company was organized and controlled by appellant, not for the benefit of its stockholders, but that appellant might, as he did, reap a rich harvest by dealing in its stock, and that the Chicago Trust and Savings Bank might make loans at usurious interest, thereby making great gain and losing nothing, so long as, in the exigencies of business, the assets of the Midland company were not exhausted by making good its guarantees, and that, by false and fraudulent representations, appellant induced appellee to purchase ten shares of the stock of said Midland company.

Village of Riverside v. Alexander Watson et al.

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1. **APPEALS—Freehold Involved.**—Where a municipal corporation, in a bill for an injunction, avers itself to be the owner in fee simple of certain premises within its limits, upon and over which a party is constructing a bridge, and prays that its title may be established, etc., and the answer denies the same, a freehold is involved.

Memorandum.—Bill for an injunction. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1894, and dismissed. Opinion filed July 2, 1894.

FRANK F. REEF, attorney for appellant.

APPELLEES' BRIEF, JOHN A. HENRY, ATTORNEY FOR ALEXANDER WATSON.

A freehold is involved where the necessary result of the judgment or decree is such that one party gains and the

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other loses a freehold estate, and so where the title is so put in issue by the pleadings that the decision of the case necessarily involves a decision of such issue. *Sanford v. Kane*, 127 Ill. 591; *Malear v. Hudgens*, 130 Ill. 225.

A freehold is involved where the right claimed is perpetual easement. *Town of Brushy Mound v. McClintock*, 146 Ill. 645; *Chaplin v. Commissioners of Highways*, 126 Ill. 264; *Piper v. Connolly*, 108 Ill. 646.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

A motion is made by appellee to dismiss this appeal on the ground that the pleadings and record show that a freehold is involved, and therefore this court is without jurisdiction.

The motion must be allowed.

The bill alleges that appellant is a municipal corporation, and the owner in fee simple of certain premises within its limits, as such corporation, upon and over which the appellee is constructing a bridge, and prays, in the language of the bill:

“That the title of your orator to said premises and tract of land * * * may be established; that said last named premises may be declared, adjudged and decreed to be found public park grounds and commons, and the title of the same vested in your orator;” and also for injunction against appellee from erecting said bridge on said premises, and for general relief.

The allegation of the bill, as to appellant's ownership, after setting out the facts upon which the claim of ownership is based, is as follows:

“Your orator further shows that under and by virtue of the aforesaid facts and proceedings, your orator is seized in trust, for the public use, of an indefeasible title in fee simple of any and all of the aforesaid public parks, grounds, streets and commons in said village, and particular that your orator is seized, as aforesaid, and is the owner as aforesaid, of all the strip of land lying along the northerly and easterly

banks of the Desplaines river, and extending to the middle of said Desplaines river, as a public park, ground and commons, as aforesaid, with the exception of the land actually situated within the definite boundaries of said block 14 in the Second Division of Riverside."

The appellee denies by his answer that appellant "ever was seized of any interest" in the premises in controversy, and claims title thereto in himself.

To maintain the issues below, both parties introduced a chain of record title to the premises, and the whole case depended upon who owned the land upon which the bridge was being erected.

Although injunction was also part of the relief prayed, its granting depended upon the title, which was put in issue by the pleadings, and must necessarily be decided. Under such circumstances a freehold is involved. *Sanford v. Kane*, 127 Ill. 591; *Malear v. Hudgens*, 130 Ill. 225; *Town of Brushy Mound v. McClintock*, 146 Ill. 643.

The appeal is dismissed.

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**George F. Harding v. Harry S. Hyman, Edward Hyman,
and Morris H. Berg, Copartners.**

1. **FAMILY EXPENSES**—*A Diamond Ring*.—A ruby and diamond ring is not a family expense, such as a wife may indulge in at the expense of her husband and against his will.

Memorandum.—Assumpsit for goods sold and delivered. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the March term, 1894, and reversed. Opinion filed June 18, 1894.

WM. J. AMMEN, attorney for appellant.

ROSENTHAL & HIRSCHL, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.
Personally I should be glad to affirm this judgment be-

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cause of the manner in which the case of the appellant is presented.

The question in the case is, whether a ruby and diamond ring sold by the appellees to the wife of the appellant is a family expense, and upon that twenty-one instructions, twenty-four reasons for a new trial, and twenty-eight errors assigned, cloud over and obscure the case of the appellant. Such a mass of chaff has the effect to make one feel that it is useless to hunt for the needle in the hay mow.

There is no decided case that touches this, but it shocks the common sense that such a ring is to be regarded as family expense. Suppose a rich wife, and husband with no property; may he indulge in horses and yachts at her cost, as family expense? Shall she, against her will, furnish him with full-jeweled watches and gold-headed canes?

We shall not undertake to mark the line. It is easy to put cases, as the appellees do in their brief, that are puzzling.

We will reverse without remanding, that the case may be reviewed by the Supreme Court.

George M. Furness v. H. T. Helm and E. A. Aborn.

1. PRACTICE—*Failure to File Affidavit with Plea, etc.*—On the trial in the Circuit Court of an appeal from a justice of the peace, the plaintiff having filed an affidavit of his claim before the justice, the defendant, although he files no affidavit of merits, is still entitled to make any defense going only to reduce the damages.

Memorandum.—Assumpsit in justice's court. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed June 18, 1894.

CRUIKSHANK & ATWOOD, attorneys for appellant.

H. T. HELM and E. A. ABORN, *pro se*.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

In half a dozen cases, see them collected in *Barnes v. Sisson*, 44 Ill. App. 327, this court has had before it questions relating to affidavits by defendants on appeal from justices of the peace. In this case a new one is presented.

The plaintiffs having filed before the justice an affidavit of claim, may the court dismiss the appeal, if the defendant files no affidavit of merits when the case is called for trial?

In effect the question is answered in the negative in the case cited, for it was there held that the defendant was entitled, without any affidavit, to make any defense going only to reduce damages. This right is cut off by dismissing the appeal.

The statute in effect provides that before the justice, the plaintiff's affidavit, in case of default by the defendant, shall be *prima facie* evidence of the amount due him, and "that in cases of appeal from the judgment of the justice of the peace, as aforesaid, such affidavit shall have the same force and effect in the Appellate Court as if said suit had been commenced in such Appellate Court." Sec. 34, Ch. 79, Justices. In the Appellate Court the affidavit of the plaintiff has two distinct effects: one is to prevent the defendant from putting in a plea unless "he shall file with his plea an affidavit." Sec. 37, Ch. 110, Practice. The Supreme Court in effect held in *Goldie v. McDonald*, 78 Ill. 506, that "with" as to the plaintiff's affidavit, was used in the statute in the sense of Webster's second definition, "to denote association in respect of situation or environment" not simultaneous happening. Whatever meaning "with" has in one part of the section it should have in the other. Now, in the "Appellate Court," the defendant can not "file with his plea an affidavit," because he does not file a plea at all. As no plea is filed, nothing can be filed "with" it.

Upon like reasoning we held in *Morgan v. Campbell*, No. 5023, that on appeal the defendant could not have an affirmative judgment or a set-off if the plaintiff did not appear when the case was called for trial, but could only have a non-suit.

Under Sec. 38 Ch. 110, Practice, the plaintiff's affidavit

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is in the "Appellate Court," as in the justice court, *prima facie* evidence for the plaintiff in case of default of the defendant, and this seems to be all that was intended by the legislature.

The attention of the court has not before been directed to this aspect of the question. It has heretofore been assumed without much consideration, that to defend, the defendant must file an affidavit, but the question was never the ground of decision. *Martin v. Hochslanter*, 27 Ill. App. 166.

The judgment is reversed and the cause remanded.

George W. Little, Albert E. Little and Jane Little v.
Annette D. Munson.

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62	618
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91	556

1. INSTRUCTIONS—*Abstract Propositions of Law*.—The practice of instructing a jury as to propositions of law in the abstract is not approved, but it is not error.

2. SAME—*Frequent Repetition*.—It is improper for a court to place, by frequent repetition, too prominently before a jury, any principle of law involved in the case, but it is not necessarily reversible error.

3. TRESPASS—*Damages—Absence of Evil Intent*.—In actions of trespass, if the injuries are inflicted without wrong or evil intent, or without a want of reasonable care or prudence, such absence of evil intent and presence of care and prudence, will prevent the recovery of punitive, but not of actual damages.

Memorandum.—Trespass for false imprisonment. Error to the Superior Court of Cook County; the Hon. GEORGE H. KETTELLE, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed March 13, 1894.

SMITH, HELMER & MOULTON and JULIUS STERN, attorneys for plaintiffs in error.

MUNN & WHEELER, attorneys for defendant in error.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The defendant in error has recovered large damages against the plaintiffs in error in an action of trespass, for assault and false imprisonment.

Nobody can be benefited by spreading the details of this unhappy controversy upon the pages of the reports of this court.

The testimony, to which the jury listened, is full of perjury on the one side or the other, and whether they rightly decided on which side, is a question that we have no right, whatever our power, to review. *Halloran v. Halloran*, 137 Ill. 100, only reiterates a rule always in force in this State, ever since the act of July 21, 1837, first made the overruling of a motion for a new trial the subject of an exception.

The plaintiffs in error assign as error the admission of improper evidence, and in their brief mention five particulars, one of which was not excepted to, and as to the others there was no error; but we can not go into an explanation without narrating circumstances which we think it better to leave untold.

The instructions are complained of, not as being incorrect in point of law, or inapplicable to the case, but because instead of the usual form, if the jury believe from the evidence so and so, then so and so, they are propositions of law in the abstract.

This form of instructing a jury is not approved, but it is not error. *Corbin v. Shearer*, 3 Gil. 482; *Green v. Mann*, 11 Ill. 613; *Parker v. Fergus*, 52 Ill. 419; *Ryan v. Donnelly*, 71 Ill. 100; *Town of Wheaton v. Hadley*, 131 Ill. 640.

In the ninth instruction the jury were told that, etc., "in a wanton, willful and insulting manner, and that the plaintiff has suffered any actual damage therefrom, then the jury are authorized to find exemplary damages;" and it is said the instruction has no foundation in the evidence, a view in which we do not concur.

And in substance the same is said in the tenth.

This repetition is urged as error, and *Irvine v. State*, 29 Texas App. 12, is cited, which is based upon *Traylor v. Townsend*, 61 Texas, 144, where it is said that "it is undoubtedly improper for a court to place, by frequent repetition, too prominently before a jury any principle of law involved in the case." In 20 Tex. App., without copying the charge of

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the judge below, the court said that "in more than one respect it is obnoxious to the criticisms made by appellant's counsel, and the objections urged to it." Counsel said that "the charge of the court is cumulative, and does repeat time and again, in such a manner as to impress upon the minds of the jurymen the idea that in the opinion of the trial judge the appellant was guilty;" with more criticism of the same character. If the charge was thus obnoxious, the conclusion that it was error would seem to be just. Here the court, by instructions asked by the plaintiffs in error covering two printed pages of the abstract, manifested entire impartiality upon the facts; among other things telling the jury that "if the defendants inflicted the injury complained of without any wrong or evil intent, or want of reasonable care or prudence, they should find the defendants not guilty;" which was much more favorable than the law will justify.

Such absence of evil intent, and presence of care and prudence, only prevent punitive, not actual, damages. *Hawk v. Ridgway*, 33 Ill. 473; *Johnson v. Jones*, 44 Ill. 142.

The amount of damages is charged to be excessive. We can not say whether it is or not. We do not know which side tells the truth. If her story is true, she ought to recover large damages; if false, very small, if any.

"The credibility of witnesses is for the jury," *Clevenger v. Curry*, 81 Ill. 442, and the judgment must be affirmed.

MR. JUSTICE WATERMAN, DISSENTING.

From the testimony of the plaintiff's brother, a man thirty-seven years of age, who was present and consulted when his sister was sent to the detention hospital, the testimony of J. S. Frasher, Geo. W. Little, Sr., M. J. Hea, R. J. Parker and Doctor Lewis, I believe that the statements of the defendants on this matter are substantially true.

That Mrs. Little felt bitterly toward the plaintiff, was alarmed, excited and angry, and when the plaintiff was at the detention hospital talked to her in a wicked and most unladylike manner, and that the conduct of George Little in making known the feelings of the plaintiff toward him,

was not that of a gentleman, while his action in thereafter going to the house where she lived was silly and unwarranted, I have no doubt; but these things do not justify, nor is there, in my opinion, established anything that justifies, the verdict and judgment rendered in this case.

Robert Stobo v. Davis Provision Company.

1. CORPORATIONS—*Directors' Meeting—Notice, etc.*—Under the statutes of Illinois, the by-laws of every corporation must provide for the calling of meetings of directors, but when all the directors are present at any meeting, however called or notified, the acts of such meeting will be as valid as if legally called and all directors notified.

2. SAME—*Motive for Calling a Meeting Immaterial.*—The question of the ulterior motive in the calling of a directors' meeting is wholly immaterial.

3. SAME—*Deposing an Officer.*—The action of a directors' meeting in deposing an officer and substituting another in his place is within the authorized power of the directors. The motives for such an action, the action itself being lawful, is not a subject of judicial inquiry.

Memorandum.—Mandamus. Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed July 2, 1894.

HERRICK, ALLEN & BOYESEN, attorneys for appellant.

PAGE & BOOTH, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee is an Illinois corporation, having its principal office in the city of Chicago.

Its by-laws provide for a board of directors to consist of three persons; and at the time of the removal of appellant from the position of secretary, which is the act complained of, its board of directors consisted of Smith M. Weed, Henry Davis, and the appellant, Robert Stobo; and Davis was president, and Stobo was secretary of the corporation.

Stobo v. Davis Provision Co.

Weed and Davis resided in New York, and Stobo in Chicago.

Stobo was also an officer of the Anglo-American Provision Company, another corporation doing business in Chicago, with which appellee had had extensive dealings, out of which litigation had resulted and was pending.

In consequence of such a condition of things, Weed and Davis, constituting a majority of appellee's board of directors, deemed it to be for the best interests of appellee, that Stobo should be removed from the office of secretary.

The by-laws of the appellee corporation provide that a majority of the board of directors shall constitute a quorum for the transaction of all business; and also, that "either the president or secretary may call special meetings of the board of directors whenever he shall deem it expedient to do so;" and also, that "any officer may be removed by the board of directors at any meeting, either general or special, and other persons elected to fill vacancies so caused."

This condition of affairs existing, Messrs. Weed and Davis came to Chicago, and a directors' meeting was held, on December 2, 1893. It is admitted that no previous notice of an intention to hold a meeting at that time and place was given to Stobo.

The following minutes of that meeting, as introduced in evidence, are extracted from the abstract of the record, filed here:

"A meeting of the Board of Directors of the Davis Provision Company, held this 2d day of December, 1893, at room 60, Board of Trade Building, Chicago, Illinois.

"Present, all the directors, Messrs. Henry Davis, Smith M. Weed and Robert Stobo.

The president called the meeting to order, and the secretary, Robert Stobo, read the following call for the meeting:

'In pursuance of the by-laws of the Davis Provision Company, the president of said company, the undersigned, Henry Davis, deems it expedient that a special meeting of the Board of Directors of this company be held, and he hereby calls a special meeting of the board to meet at once—all the

directors being present, at the general office of the company in Chicago.

(Signed) HENRY DAVIS.

DECEMBER 2, 1893.'

"The secretary, Mr. Stobo, now got the minute book, and presented it.

"Mr. Weed stated to Mr. Stobo, that under existing circumstances the secretary ought to be changed, and gave his reasons. Mr. Stobo then said that he thought it would be better for the board to remove him from office, than for him to resign, and looked over the company's by-laws to see the power of the board in the premises.

"Mr. Weed now offered the following resolution:

"WHEREAS, Robert Stobo, Esq., the secretary of this company, is interested in or employed by the Anglo-American Provision Company and Fowler Brothers, and these companies are hostile to the interests of this company; it is therefore

'*Resolved*, That it is for the best interest of this company that Robert Stobo be and he is hereby removed from the office of secretary of this company, and he is hereby directed to hand over the seal, books, records and papers of this company to his successor.'

"The passage of this resolution having been duly moved and seconded, Mr. Stobo first said he would protest against its passage, and then said he would say nothing, and left the room.

"The resolution was now put to the meeting and duly declared carried.

"Mr. Weed now moved the passage of the following resolution:

'*Resolved*, That Michael L. Freiburger, of Howland Block, Chicago, Illinois, be and he is hereby elected secretary of this company in place of Robert Stobo, removed, and that he be and is hereby authorized and directed to demand and receive from Robert Stobo, the late secretary, the seal, books, records and papers of this company.'

"Its passage having been duly seconded, it was put to this meeting and carried.

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“Michael L. Freiburger now appeared and accepted the office of secretary.

(Signed) “HENRY DAVIS,
“President.”

Stobo, the secretary and appellant, refused to comply with a demand made upon him by Freiburger, the newly elected secretary, for possession of the records and corporate seal of the company, and thereupon a petition for a writ of mandamus was filed by the appellee to compel such delivery.

The issue turns upon the question whether the meeting of directors, at which appellant is claimed to have been removed and Freiburger to have been elected, was a legal meeting of directors, and could effectually accomplish what was attempted to be done.

Appellant contends that no notice having been given of said meeting, it required not only the physical presence in the room when the president elected to call a meeting of all the directors, but it required the assent of all to the holding of a meeting at all, and until such assent had been given no meeting could be legally held, and that everything that was done at such meeting was of no force and effect as the act of the corporation.

Appellant upon the record also raised the question of the good faith of Smith M. Weed and Henry Davis in attempting to remove Stobo from the office of secretary, and contended that even though it be conceded that Mr. Stobo assented to the holding of a meeting, if such assent was procured by trick, device, surprise or fraud, so that the director whose presence was so secured had no opportunity to elect whether or not he would be present and assent to the holding of a meeting, such presence would be ineffectual to constitute a legal meeting of the board of directors of the Davis Provision Company.

Appellant also submitted to the court and asked leave to go to the jury on the question of fact as to whether the action of Smith M. Weed and Henry Davis, constituting a majority of the board of directors, was taken in good faith for the benefit of the corporation, or was a device and fraud

to subserve a personal end in a controversy then existing between the majority and minority of the stockholders and directors of the Davis Provision Company, and contended that if such action, even though within the legal power of the directors, if exercised in good faith, was tainted with fraud, and was for personal rather than corporate objects, then such action would not be binding upon the corporation.

There is no conflict in the testimony, because appellant rested upon the case made by the relator, but contended that upon this record so made, that questions of good faith did arise as questions of fact, to be submitted to a jury.

The court below directed a verdict for the relator and rendered judgment.

We will not follow the appellant through the variety of argument presented to us, to show that the meeting was not a legal one, but will give a few reasons why it was legal and its action controlling. The statutes of Illinois relating to corporations, Chap. 32, Sec. 20, provide that the by-laws of every corporation shall provide for the calling of meetings of directors, and that when all such officers shall be present at any meeting, however called or notified, the acts of such meeting shall be as valid as if legally called and notified.

The by-laws of the corporation already quoted provide that the president might call a meeting whenever he should deem it expedient to do so. It was proved that two of the directors, including the president, went to the office in order to hold a directors' meeting; that they there found Stobo, the other director; that the president then formally called a meeting in writing, as shown before by the notice thereof; that all three of the directors were present at the meeting and participated in its deliberations up to a certain point, Stobo, the secretary, and appellant, producing to the meeting the record book of the corporation, and questioning the power of the board to remove him, as secretary, and protesting against the passage of a resolution offered to that effect, and not until then withdrawing from the meeting.

Under this condition of facts we can see no question worthy of argument, and no authority has been, or to the extent of

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our observation can be, presented, against the power of the majority of the board to do as was done. See in this connection, *Lawrence v. Traner*, 136 Ill. 474.

It was entirely proper for the court to refuse to submit to the jury the question of ulterior motive in the calling of the meeting.

The power to call the meeting was expressly vested in the president by the by-laws of the corporation, and the statute of the State.

The action of the meeting in deposing an officer and substituting another was clearly, within the authorized power of the directors, and was performed in a lawful manner. What the motives were for such action, the action itself being lawful, was not a subject of judicial inquiry. *Oglesby v. Attrill*, 105 U. S. 605.

At the meeting in question, every director was present and participated until such action was proposed as was distasteful to one, who then withdrew, but the rest, constituting a majority, remained.

Under such circumstances, to set aside the action of the board, so lawfully convened and acting within its powers, would be subversive of all lawful control by directors over the affairs of a private corporation.

The judgment of the Superior Court will be affirmed.

Railway Passenger & Freight Conductors' Mutual Aid and Benefit Association v. Lucy J. Swartz.

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1. **MUTUAL BENEFIT ASSOCIATIONS—*Delinquent Members Must Be Treated as Such—Waiver.***—A member of a mutual benefit association was delinquent in paying assessments, but the association, instead of striking his name from the roll, retained it, and continued, by the levying of assessments, to treat him as a member in good standing; afterward, and while delinquent, he was killed. Another member, a friend of the deceased, who was also delinquent, sent in his own assessments and also the deceased's with it; the association accepted that of the live member, but rejected that of the dead. *It was held*, that the association waived its right to forfeit the deceased's membership by continuing to subject him to assessments.

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2. *SAME—Waiver of the Right of Forfeiture.*—If a mutual benefit association continues to treat a delinquent as a member in good standing after it has the right to forfeit his membership, he should be considered as a member in good standing for all purposes.

3. *SAME—Waiver of Payment by Subsequent Assessments.*—Where a mutual benefit association makes an assessment against an assured member after he has failed to pay a previous assessment within the time prescribed by the rules, it waives the right to forfeit the policy for such failure, and admits that such delinquent is a member of the association.

4. *SAME—Forfeiture Prevented by Estoppel.*—If the practice of an association and its course of dealings with its members has been such as to induce a belief that so much of their contract of insurance as provides for a forfeiture in a certain event, will not be insisted upon, the association will not be allowed to set up such forfeiture, as against one in whom their conduct has induced such a belief.

Memorandum.—Assumpsit on mutual benefit association certificate. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed July 2, 1894.

PECK, MILLER & STARR, attorneys for appellant.

GREGORY, BOOTH & HARLAN, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit against the appellant by the appellee, claiming as the widow of Sherman S. Swartz, deceased, to recover the amount of a membership benefit ensuing from his death.

The appellant is, as its name indicates, a mutual benefit society, conducted upon the assessment plan, with a membership restricted to railway conductors, not exceeding fifteen hundred in number.

The deceased was a resident of Swanington, Indiana, and was employed as a conductor upon both passenger and freight trains, by the Chicago & Indiana Coal Railroad Company, operated at that place. He became a member of the association on October 24, 1887, and died August 15, 1889, from an injury received, in the performance of his duty, on the day before.

Proofs of his death were duly made out and presented to the appellant, but payment was rejected on the ground that Swartz was delinquent in the payment of assessments and had, in consequence, forfeited his membership.

The constitution of the association provides that in no case shall a greater sum than \$2,500 be paid on account of the death or disability of a member, and the by-laws provide that in case of death, the benefit money shall be paid as directed by the last will of the deceased member, or, if he leaves no will, to his widow. Swartz left no will and the appellee is his widow.

The certificate of membership issued to Swartz, omitting the caption only, was as follows:

“CHICAGO, October 24, 1887.

This is to certify that S. S. Swartz, residence Swanington, Indiana, is a member of the Railway Passenger and Freight Conductors' Mutual Aid and Benefit Association.

Given under our hands and the seal of the association affixed.

(SEAL.)

JOHN R. SANDY, President.

C. HUNTINGTON, Secretary and Treasurer.”

In accordance with an instruction given by the court at the request of appellee, that if the jury “find from the evidence and under the instructions of the court, that the plaintiff is entitled to recover, your verdict will be for the maximum amount specified in the certificate, less three assessments payable in June, July and August, 1889, and interest at five per cent from November 1, 1889,” the jury returned a verdict in favor of appellee for \$3,000, and from a judgment entered upon such verdict this appeal is prosecuted.

The point is made that as it is provided in the constitution that in no case shall the beneficiary receive more than \$2,500, and as there is no amount specified in the certificate, the quoted part of the instruction is erroneous.

Had an assessment been made on the membership of the association at the rate of \$2.50 for each member, as required

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by the constitution, and it had realized a fund less than \$2,500, the liability would probably—although that question has not been argued, and therefore our expression is guarded—have been limited to the extent of the fund realized. *Metropolitan Accident Association v. Windover*, 137 Ill. 417 (on p. 435).

But here no assessment was made to meet the loss occasioned by the death of Swartz. It was alleged in the declaration that an assessment, if made, would have realized more than the full amount of \$2,500; and it was proved by the testimony of the clerk of the grand secretary of the appellant association, that there were 206 divisions with which the association kept accounts in the months of June, July and August, 1889, averaging about six members, or a little more, to the division, and his testimony to that effect stands in no manner disputed.

That would make a total membership of at least 1,236, upon whom an assessment of \$2.50 per member, as required by the constitution and by-laws, would realize more than the maximum benefit to be paid. We therefore think the instruction was correct, that the damages, if any, should be the maximum amount. The point that no amount is specified in the "certificate" is not well taken. The jury evidently were not, and could not well have been misled by the use of the word "certificate" in the instruction. The paper certificate that was delivered to Swartz was a mere evidence of his membership, and did not pretend to constitute the contract between the association and himself. That was to be found in the constitution and by-laws of the association and his application for membership, wherein he agreed to compliance with them.

The amount, if anything was payable, was ascertained and due before November 1, 1889, and properly drew interest from that date.

There are many suggestions by counsel for the appellant, directed to the sufficiency of the declaration and the proof, which we will not stop to consider in this opinion, for we do not regard them as important or at all substantial.

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The really important question in the case is involved in the proposition that constituted the main defense below, viz., that Swartz was not a member in good standing at the time of his death.

The constitution and by-laws are in many respects singularly indefinite, but they seem to contemplate a subdivision of membership into sections, or divisions, named after the respective railroads on which the several members are employed. For example, here, Swartz would be known as belonging to the Chicago & Indiana Coal Railroad division of the association, by reason of his employment as conductor on the railroad of that name.

Without providing how such an officer shall be chosen or appointed, the by-laws prescribe the duties and powers of a "local secretary of each road or division."

Articles one, four and five of the by-laws treat of the local secretary, and are as follows:

"ARTICLE I.

"The members of this association on each road, or each division of a road, shall be entitled to one delegate to represent said road or division in annual convention, and in addition thereto, the secretary of each road or division shall also be a delegate. The secretary of each road or division of a road shall, thirty days prior to the meeting of the annual convention, send to the secretary the names of the delegates elected, and the secretary shall issue a certificate to said delegate or delegates, entitling him or them to seats as a representative in said convention.

"ARTICLE IV.

"The local secretary of each road or division shall, in case of the death of any member, after having received a certificate of the death of said member, signed by the attending physician, and with a certificate signed by the undertaker who prepared the body for burial, both having been duly sworn to before a justice of the peace or notary public, forward the same to the secretary, whose duty it shall be to present the same to the board of directors, and with their

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endorsement, and the approval of the president, shall notify the local secretary of each road, or division of a road, who will assess each member of said road, or division of a road, the sum of two dollars and fifty cents each, and send such sums of money as collected to the secretary and treasurer.

“ARTICLE V.

“The secretary shall, within thirty days after such collections have been made, forward the amount to the legal heirs or representatives of the deceased members, and through the local secretary of said road or division they shall acknowledge and give lawful receipt for the amount of money thus paid and received.”

Article six of the constitution, regarding eligibility to membership, provides that a certificate of the requisite facts to entitle an applicant to membership shall be made by the local secretary and accompany each application.

These extracts from the constitution are all that we find pertaining in any way to the local secretary, but are sufficient to show his importance in the system under which the association was operated.

The Chicago & Indiana Coal Railroad division appears always to have been small. At the time Swartz became a member it consisted of but three members, Wright, Hildreth, and Swartz. Wright was the first local secretary, and after he left that road and went to another, Hildreth became local secretary and acted as such until Swartz was killed. The notices of the assessments upon which it is claimed that Swartz was delinquent, as well as all former ones, were all sent to Hildreth and delivered through him to Swartz, and he collected all former assessments and remitted them to the association, and did in fact collect the assessment for June, 1889, upon which Swartz was subsequently declared delinquent.

Article six of the by-laws of the association reads as follows :

“Any and all members of this association neglecting or refusing to pay any assessment for the period of thirty days from the date of such assessment, shall cease to be a mem-

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ber, and the secretary shall strike his name from the roll of membership, and he shall only be re-admitted to membership upon the payment of all unpaid assessments and an additional fee of \$2."

It is admitted that assessments for the months of June, July and August, 1889, were made against Swartz, and notices thereof delivered, through Hildreth, the local secretary, to him in apt season, and that he did not pay either of the two former within thirty days from their date, nor the latter within the first half of August during which he lived. It is also admitted that if at the expiration of thirty days from the dates of either of the assessments for June or July, the association had elected to terminate the membership of Swartz, it might have done so, and the grand secretary might have stricken his name from the roll of membership.

On August 10th, Swartz paid to Hildreth, who gave his receipt therefor, as local secretary, the assessment of \$2.50 for June, and asked him to wait until pay day, in the middle of the month, for the July and August assessments, and asked him to hold the \$2.50 paid for June until that time, so that all might be remitted together.

Hildreth, being in arrears with his own, agreed to the suggestion.

Swartz was paid his wages on August 14th, but received his fatal injury later on that day, before paying any more to Hildreth. On August 16th, Hildreth wrote to the grand secretary as follows:

"CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, }
BRAZIL STATION, August 16, 1889. }

Mr. C. Huntington.

DEAR SIR: I remit to you \$10 on assessments Nos. 199, 201, 203. You will see that I have only remitted No. 199 for myself and S. S. Swartz. Now, I tell you the circumstances. I have been waiting for him. He gave me his dues for No. 199 August 10th, and as pay day was the 14th I told him we would remit the whole; but he got killed the afternoon of the 14th, just after he had drawn his money, so I have not got it. Will it debar him or his widow from

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getting money on the policy? Please write me and let me know. I will send it to you as soon as I hear from you.

Respectfully yours,

W. E. HILDRETH."

A marginal note on the formal remittance sheet accompanying that letter, was made by a clerk of the association, indicating that it was received on August 19th, and on that day the \$2.50 received for Swartz' June assessment was returned to Hildreth, and on the same day, August 19th, Swartz was entered on the roll of members, not as dead, but as delinquent, as of July 1, 1889, for the June assessment.

It is shown by the evidence that Swartz was usually delinquent on assessments levied upon him. Out of twenty assessments levied upon him on and after June 1, 1888, he was delinquent on seventeen by from eight days to one month and nineteen days, and yet he was always recognized by the association as a member in good standing. Subsequent assessments, in every case, were made upon him, and subsequent payments received from him, and his name retained upon the roll of membership, notwithstanding his delinquency.

It was not until after his death, and after he had paid the assessment for June, that he was declared delinquent for non-payment of that assessment. It would seem as if the fact was that his membership was forfeited because he had died, and not because he was delinquent.

He was delinquent on the June assessment when the July assessment was levied, and was again delinquent on the July assessment when the August assessment was levied, and yet such fact did not prompt the association to strike his name from the roll, but on the contrary, it retained his name and continued, by the levying of those assessments, to treat him as a member in good standing.

Hildreth, also, was delinquent when he remitted his own assessment along with that of Swartz for June, and yet Hildreth's assessment, he being alive, was accepted and retained while Swartz' assessment, he being dead, was rejected and returned.

The conclusion, we think, is a fair and reasonable one, that, considering the circumstances, including the custom of the association with reference to Swartz' former delinquencies heretofore alluded to, the association waived its right to forfeit his membership under the by-law quoted, when, after the right to so treat him had accrued to the association, it continued to subject him to assessments.

If the association continued to treat Swartz as a member in good standing, after it had the right to not so treat him, what is more reasonable than that he should be considered as a member in good standing for all purposes?

If he were a member to respond to assessments, why was he not a member to share in benefits?

There is no pretense of fraudulent conduct or representation, or of mistake, or lack of notice or knowledge, in the case.

We think the evidence clearly shows that the association was in the habit of treating the by-law quoted, as waived, as to Swartz, and that it was waived up to the time of, and until after, his death. It is not pretended that Swartz ever had notice from the association that it would treat him any different with reference to the June and July assessments, from what it had treated him with reference to the preceding assessments paid and accepted after he was delinquent. And a waiver once made is operative until notice of its revocation is given.

Notwithstanding, under numerous authorities, by-laws with similar wording to the one under consideration, have been held to be self-executing and requiring no act of the association to put them into effect, still the authorities are controlling that a forfeiture under such a by-law may be waived.

In *Metropolitan Accident Association v. Windover*, 137 Ill., *supra*, at page 432, it is said by the learned justice who wrote the opinion:

“It can not be doubted that, while by the express terms of the defendant's by-laws, the consequence of a failure to pay an assessment within thirty days after notice, was a for-

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feiture of all claims the member might have against the defendant by reason of his certificate, the forfeiture thus provided for, was one which the defendant was at liberty to waive, and that such forfeiture, after once being waived, was incapable of assertion by the defendant. A forfeiture of this character is a matter of strict legal right, and the defendant in order to assert it, must abide inflexibly by the terms of its contract. * * *

It follows that conduct on the part of the association inconsistent with an intention to abide by the strict terms of the contract and insist upon a forfeiture, if not amounting to a waiver, is, at least, evidence of a waiver. * * * By levying and collecting from him further assessments, the defendant treated him as still a member, and liable to the obligations, and consequently entitled to the benefits belonging to that relation."

In *Stylov v. Wisconsin Odd Fellows Mut. L. Ins. Co.*, 69 Wis. 224, the court says:

"It is equally plain that, had payment been tendered the day before the death of the insured, such payment would have been accepted. The forfeiture, if any, arose upon the non-payment on or before the day fixed for payment, and it is clear from the evidence that the company did not consider it forfeited on that day; and it can not afterward declare it forfeited because of the happening of an event which has nothing to do with the payment of the sum due. That the company did not consider the policy forfeited on account of the non-payment of assessment No. 17, is very clear from the fact that they made assessment No. 19 against the deceased after No. 17 was past due. * * *

Every time the company makes an assessment against the assured after he has failed to pay a previous assessment within the time prescribed by the rules, it waives the forfeiture of the policy for such failure, and admits him to be a member of the company, notwithstanding such failure."

In the last cited case, the by-law under which forfeiture of membership was claimed, was as follows:

"If any member fails to pay the secretary any assessment

made upon him within sixty days from the date of notice issued by the secretary, his membership shall cease, and he can only be reinstated upon the terms fixed by the by-laws."

And in that case there remained wholly unpaid at the death of the insured two assessments, one of which had been made and notice given, 106 days, and the other eighty days before the death of the insured.

Upon the trial it was in that case shown that nearly all assessments which had been paid by the insured were paid at dates ranging from eleven to 194 days after the expiration of the sixty days fixed by the by-law.

In the concluding part of the opinion the court further says:

"We are of opinion that after the constant course of the company with the assured, as shown by the evidence in this case, the only way the company could insist upon a forfeiture for non-payment within the time fixed by the by-laws would be by giving the assured personal notice that thereafter punctual payment would be required. It can not, with any plausibility, be argued that in this case the company did not consider the deceased a member of the company up to the very time of his death, as the evidence shows that the assured was in his usual health up to the minute of his death."

There are many circumstances in that case, parallel with those in the case under consideration.

The case of Insurance Co. v. Norton, 96 U. S. 234, was one where the company had refused to pay the insurance on the ground that the policy was forfeited by reason of the non-payment of certain notes given for the last two premiums maturing before the death of the insured.

The provision in the policy was that if the premium or any premium note were not paid at maturity, the policy should "cease and be null and void without notice."

In commenting upon the effect of an agreement by the agent of the company to extend the time for the payment of premium notes after they had matured, the court, speaking through Mr. Justice Bradley, said:

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"It is vain to contend that it (the company) gave them no authority to do this (give extensions), when it constantly allowed them (the agents) to exercise such authority, and always ratified their acts, notwithstanding the language of the written instruments."

And a recovery upon the policy was sustained.

Again, in *Chicago Life Ins. Co. v. Warner*, 80 Ill. 410, our Supreme Court said:

"If the practice of the company and its course of dealings with the insured, and others known to the insured has been such as to induce a belief that so much of the contract as provides for a forfeiture in a certain event will not be insisted on, the company will not be allowed to set up such forfeiture, as against one in whom their conduct has induced such belief."

This doctrine is, also, laid down as the correct one in *Hartford Life Ins. Co. v. Unsell*, 144 U. S. 439; see also *Sweetser v. Odd Fellows Association*, 117 Ind. 97; *Painter v. Industrial Life Association*, 131 Ind. 68.

If in this case there was a waiver at all, it was in force up to the time of Swartz' death, and being then in force, the association could not, after death had intervened, deny to Swartz a standing at death which had been accorded to him up to the moment of death. His rights, and the rights of her who claims under him, were fixed by his death, and could not be altered by the *post mortem* action of the association, by its secretary, in marking up against him a forfeiture as of a day six weeks before.

Our conclusion is that the association, by its conduct with Swartz, waived the forfeiture provided by the by-law, and that he was a member in good standing at the time of his death, and that the judgment of the Circuit Court was right. It is therefore affirmed.

Joseph Fish et al. v. John V. Farwell et al.

54	457
62	269
62	554
160s	236
54	457
165s	92
54	457
190	815

1. PLEADING—*Identification of the Cause of Action.*—What cause of action is sued upon can only be determined by the declaration, of which nothing extrinsic is a part. It is not helped or harmed by copies of instruments or bills of particulars attached.

2. STATUTE OF LIMITATIONS.—*Amendment to Pleadings.*—When an amendment sets up no new matter or claim, but merely restates, in a different form, the original cause of action, it relates to the commencement of the suit, and the statute of limitations is arrested at that point; but where the amendment introduces a new or different cause of action, it is treated as a fresh suit, begun at the time when such amendment is filed, and the statute is arrested at the latter date.

3. PARTIES—*Discontinuance Under the Statute.*—If too many parties are sued, the statute permits an amendment by discontinuance as to such parties, even after a verdict has been returned.

4. DEFENSES—*Good as to One Partner, Good as to All.*—Where one member of a firm is a necessary party to a suit, and has a good defense under the statute of limitations, the other members of the firm are entitled to the benefit of it.

Memorandum.—Assumpsit. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed July 2, 1894.

MOSES, PAM & KENNEDY, attorneys for appellants.

TENNEY, CHURCH & COFFEEN, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

September 29, 1888, the appellants filed a praecipe and sued out a summons against the appellees, six in number, which was returned served October 3, 1888, on John V. Farwell, Jr., only. December 7, 1888, the appellants filed a declaration in assumpsit, containing only common counts.

October 29, 1891, was this order: "On motion of attorneys for defendants, it is ordered that the plaintiffs file herein a bill of particulars under the declaration filed by them within twenty days from this date; and it is further ordered, on motion of plaintiffs' attorney, that leave be, and is hereby given said plaintiffs to file additional counts herein within twenty days from this date."

And November 27, 1891, the appellants filed a bill of particulars as follows:

"Rent for premises for manufacture of garments for defendants, \$1,500.

Salary to Mr. and Mrs. M. Cohen in and about manufacture of garments for defendants, \$2,100.

Paid for engine to be used in manufacture of garments for defendants, \$800.

Paid for twenty-eight machines to be used in manufacture of garments for defendants, \$700.

Paid for furniture, tables, etc., to be used in manufacture of garments for defendants, \$100.

Loss on goods bought and manufactured by plaintiff on account of contract of defendants, caused by a resale at sacrifice, \$9,000.

Loss of profits on garments agreed to be taken and received by defendants from plaintiffs and by defendants refused, at 10 per cent on amount contracted for, \$12,500."

Then January 30, 1892, the appellants filed additional counts upon an executory contract between the parties, by which the appellants were to manufacture goods for the appellees, and alleging breach by the appellees.

To those counts John V. Farwell, Jr., pleaded that the causes of action occurred more than five years before the filing of the counts, and without setting out in detail the pleadings, the question now is, whether by anything on the record or among the files, or by averment of notice to the appellees of what the appellants intended to sue for, or averment of what in fact they intended to sue for, the plea can be avoided. That if the appellants have any cause of action, it occurred more than five years before January 30, 1892, is not controverted. And that such a cause of action as they may have could be proved under the original declaration, is not claimed.

The new counts are not a re-statement, by way of amendment, or the cause of action set up in the original counts, but a statement of a different cause of action. The original declaration was for compensation for what had been done, the new counts for damages for not doing.

Fish v. Farwell.

What cause of action is sued upon can only be determined by the declaration, of which nothing extrinsic is a part. *Hart v. Tolman*, 1 Gilm. 1.

The pleading is not helped or harmed by copies of instruments or bills of particulars attached. *Cossett v. Union Mut. Acc. Ass.*, 27 Ill. App. 266; *Humphrey v. Phillips*, 57 Ill. 132; *Quincy Whig Co. v. Tillson*, 67 Ill. 351.

Now the rule is that "when an amendment sets up no new matter or claim, but merely restates, in a different form, the cause of action set out in the original declaration, it relates to the commencement of the suit, and the statute of limitations is arrested at that point; but where the amendment introduces a new or different cause of action, it is treated as a fresh suit, begun at the time when such amendment is filed, and the statute is arrested at the latter date." *C. B. & Q. R. R. v. Jones*, 149 Ill. 360; 37 N. E. Rep. 247.

So far as relates to John V. Farwell, Jr., this case is much like *Gorman v. Judge*, etc., 27 Mich. 138.

Whatever can be said here as to what the appellants intended to sue for, and what notice he had of their intention, could be said there. As to him, then, the statute of limitations is a valid defense, not to be avoided.

Other members of the firm were served with process after the additional counts were filed, and it is contended that as to them the suit was pending from the time the original summons was issued, upon any cause of action declared upon before they were served.

We need not consider that question.

John V. Farwell, Jr., is a necessary party to the suit. Even if, as may be the law of this State, obligations of partners are several as well as joint, on which we still refrain from committing ourselves (*Nat. Bk. of Oshkosh v. Jennings Tr. Co.*, 44 Ill. App. 285), yet on such obligations, if more than one is sued, all must be. *Cummings v. People*, 50 Ill. 132.

Whether that case is right on a question of pleading is beside the present inquiry.

And here all are sued, and judgment must go against all

served or none; none can be dismissed out of the case, and judgment entered against the others. *Tolman v. Spaulding*, 3 Scam. 13.

Though if too many are sued the statute permits an amendment by discontinuance, even after verdict. *Cogshall v. Beesley*, 76 Ill. 445.

But a good defense, not merely personal, to one of the firm, bars the action. *Faulk v. Kellums*, 54 Ill. 188; *Jansen v. Grimshaw*, 125 Ill. 468.

John V. Farwell, Jr., having a good defense under the statute of limitations, the other defendants, appellees, have the benefit of it, and the judgment is affirmed.

Carl F. Julin v. The Ristow Poths Manufacturing Company.

1. **CROSS-BILL**—*In Mechanics' Lien Proceedings*.—It is not necessary for a defendant in a proceeding for a mechanics' lien to file a cross-bill asking for affirmative relief in setting off his damages sustained for non-completion of the contract.

2. **LIEN**—*Extent of Sub-Contractor's*.—The statute does not permit a lien in favor of a sub-contractor, except to the extent of the owner's indebtedness to the original contractor at the time of giving notice.

3. **SUB-CONTRACTOR**—*Rights Depend on the Original Contract*.—The right of a sub-contractor to a lien is subject to the original contract; so held where the contract contained a clause providing for the allowance of ten dollars per day as liquidated damages for each day during which the building should be delayed after the date stipulated for the full completion of the job.

4. **SAME**—*Fund Out of Which He is to be Paid*.—The original contractor is the real debtor to the sub-contractor, and the amount due to him from the party for whom the work is done, is the only fund out of which the sub-contractor can be paid.

5. **MASTER IN CHANCERY**—*Exceptions to Report*.—Exceptions to a master's report are to be confined to such objections as are allowed or overruled by him.

6. **MASTER'S REPORT**—*Exceptions by Persons Not Parties*.—If a person not a party to the suit is interested in a master's report and is dissatisfied with it, he must leave objections to the draft as a preliminary step to putting himself in a situation to take exceptions.

54	460
58	589
54	460
78	640

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7. *SAME—Exceptions When it is to be Made the Foundation of a Decree.*—As to all references to a master, of such a nature that his report is to be made the foundation of a further decree or decretal order, no party is at liberty, without a special order, to except to the report, or present a petition in the nature of an exception thereto, unless he has, previously to the signing of the report, carried in objections, in writing, to the draft report, specifying the points in which he considers it to be wrong.

8. *PRACTICE IN EQUITY—Revision of the Rulings of the Master.*—The mode of procedure requires a party, who may desire to have the court revise the rulings of the master as to the admission or rejection of evidence, or the principle upon which an account is stated, to file objections to the report before it is returned into court, pointing out the grounds with reasonable certainty.

9. *SAME—Exception to Allowance of Claims—Objections Waived.*—The exception to the allowance of a claim must be taken before and disallowed by the master; until such an exception is so taken and disallowed, the parties can not be heard in the trial court. Failing to take such exceptions before the master the objection will be regarded as waived.

Memorandum.—Proceeding to enforce sub-contractor's lien. Appeal from the Circuit Court of Cook County; the Hon. SAMUEL P. McCONNELL, Judge, presiding. Heard in this court at the March term, 1894. Reversed with directions. Opinion filed June 18, 1894.

STATEMENT OF THE CASE.

This is a petition for a mechanic's lien, filed by the appellee as a sub-contractor, against Charles Oberg, the original contractor, and Carl F. Julin, the owner of the property, for millwork furnished under a sub-contract. Oberg was defaulted and Julin filed his answer setting forth that at the time of serving the sub-contractor's notice upon him, on January 4, 1892, there was due Oberg, the original contractor, only \$182.32, this being the balance after deducting the damages to which Julin claimed he was entitled on account of the delay in the completion of the original contract. The case was referred to a master, who reported in favor of a lien for \$620, allowing Julin \$213 damages. Both parties excepted to the report. The court sustained the exceptions of appellee, overruled those of Julin, and decreed a lien for \$971.58, as prayed for in the petition. Julin took an appeal.

C. E. CRUIKSHANK and FRED H. ATWOOD, attorneys for appellant

VOCKE & HEALY, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was a petition by the appellee, for a sub-contractor's lien, for furnishing the millwork used in the construction of a house contracted to be built for the appellant by one Charles Oberg. The sub-contract price was \$950, and some extra work was done which increased the total claim of the appellee, the sub-contractor, to \$971.58.

The original contract between appellant and the contractor Oberg provided for the allowance of \$10 per day as liquidated damages for each day during which the building should be delayed after the date stipulated for the full completion of the job. The date provided for the completion of the building was October 20, 1891, but the building was not in fact completed until December 1st, and in some minor and unimportant particulars, not until December 24, 1891.

There appears to be no serious defense to the claim of appellee, except on the ground that there was nothing, or at least but an amount very much smaller than was found in the decree, due from appellant to Oberg, the original contractor, at the time of serving the lien notice. Such a result is reached by crediting appellant with damages at the stipulated rate of \$10 per day for a greater or less number of days' delay in the completion of the building from and after October 20, 1891.

The master to whom the cause was referred to take proofs and report his conclusions both upon the law and the evidence, found that there remained in the hands of the appellant at the time appellee gave notice of his lien, the sum of \$833 of the contract price to be paid to the original contractor, after deducting all payments.

He also found that the building was completed on December 1, 1891, and that its rental value from October 20th to

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December 1, 1891, a period of forty-one days, was \$213, and he allowed that sum to the appellant as the actual damages to him, occasioned by the delay, and rejected his claim to be allowed damages at the stipulated rate of \$10 per day.

Upon such findings the master recommended that a decree be entered in appellee's favor for the sum of \$620, which was the difference between the balance so found to be remaining in the hands of the appellant at the time of service of the lien notice, and the amount of damages found to have been occasioned to appellant from delay, on the basis of rental value of the premises.

Neither party was satisfied with the report of the master, and both parties filed exceptions in the Circuit Court to the report.

Without hearing any evidence that was not before the master, the Circuit Court sustained the exceptions of the appellee and overruled those of the appellant, and entered a decree giving appellee a lien for the full amount of \$971.58, claimed by the appellee, and disregarding all claims of appellant for damages.

The appellee, in urging that the decree be sustained, contends that it is consistent with the facts, and that to entitle appellant to an allowance for damages he should have filed a cross-bill asking for affirmative relief in setting off his damages against the fund in his hands belonging to the original contractor.

Considering the last proposition first, we are of opinion that a cross-bill was not necessary.

The statute does not permit a lien in favor of a sub-contractor except to the extent of the owner's indebtedness to the original contractor at the time of giving notice.

The amount of such indebtedness is just as much a matter of defense when it is to be determined from the amount of damages sustained by reason of the default of the original contractor, as when it is to be ascertained by the amount of payments rightfully made to him, and a cross-bill is no more necessary or appropriate in the one case than the other.

Upon what theory or principle the Circuit Court rejected the allowance of damages by the master does not appear. If it were upon the theory that there was an independent contract between appellee and appellant, it is sufficient to say that neither the petition nor the decree proceed upon that theory. Both proceed upon the theory of a sub-contract.

The objectionable practice was pursued of allowing exceptions to the master's report to be considered by the Circuit Court when no objections to the report had been previously presented to the master.

"Exceptions are always to be confined to objections allowed or overruled by the master." 2 Daniell's Ch. Pl and Pr. 1302, note 4.

"If a person interested in the report, though not a party to the suit, is dissatisfied with it, he must leave objections to the draft as a preliminary step to putting himself in a situation to take exceptions." Ibid. 1303.

"As to all references to a master, of such a nature that his report thereupon is to be made the foundation of a further decree or decretal order, no party is at liberty, without a special order, to except to the report, or present a petition in the nature of an exception thereto, unless he has, previously to the master signing the report, carried in objections, in writing, to the draft report, specifying the points in which he considers the report to be wrong." Ibid. 1302.

"Consistently with the convenience of courts of equity in this respect, their mode of procedure requires the party who may desire to have the court revise the rulings of the master as to the admission or rejection of evidence, or the principle upon which an account is stated, to file objections to the master's report before it is returned into court, pointing out the grounds with reasonable certainty." *Hurd v. Goodrich*, 59 Ill. 450; *Prince v. Cutler*, 69 Ill. 267.

"The exception to the allowance of the claim of appellant should have been taken before and disallowed by the master; (and) until such an exception is thus taken and disallowed, the parties can not be heard on exceptions in the Circuit

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Court, * * * and failing to take exception before the master, the objection should be regarded as waived." *Pennell v. Lamar Ins. Co.*, 73 Ill. 303; *Jewell v. Rock River Paper Co.*, 101 Ill. 57.

There was no evidence heard by the court that was not heard by the master. The certificate of evidence brought here recites that all the evidence set forth in the master's report, which was made a part of the record, was offered and read upon the hearing of the exceptions to the report, and in order to determine the correctness of the report, although there were no objections presented to the master, we have followed the bad example set by the Circuit Court, and read the evidence, with no intention, however, of establishing a precedent to be hereafter followed.

From such examination it seems very clear to us that the master found correctly that there remained in the hands of appellant at the time the notice was served upon him, and at the date of the filing by the appellee with the clerk of the Circuit Court, of the statement of account, no more than the sum of \$833, due to the original contractor. And the statute is too plain to admit of construction or argument, that the sub-contractor can have no decree for an amount in excess of that due from the owner to the original contractor.

The decree, therefore, in any event, should not have been for so much as \$971.58.

But it is without substantial contradiction that there was a delay, in completing the building, of at least forty-one days.

If this delay were without the fault of appellant, and there is no evidence that he was at all in fault in the matter, he was entitled by the terms of his contract with Oberg, the original contractor, to damages for the delay.

Whether it were material or not, as a matter of law, that the appellee had notice of the time clause in the contract of the original contractor, need not be discussed, although it is the law that the right of a sub-contractor to a lien depends upon that contract. *Welch v. Sherer*, 93 Ill. 64.

There was conflicting evidence as to that fact, and the master's conclusions, for anything that appears, should not

have been in that regard overruled, when there was evidence tending strongly to establish the existence of such a state of facts as did rightfully require an allowance out of the funds remaining in appellant's hands of the damages suffered by him.

"The findings of a master in matters referred to him in regard to the facts established by the testimony, is as conclusive upon the parties as the verdict of a jury in a civil cause, and will be reviewed or set aside only for the same reasons that a verdict would be. Where there is evidence tending to establish the facts found, neither the Court of Chancery nor the Supreme Court on appeal, will review the findings in regard to the weight to be given to the testimony." *Howard v. Scott*, 50 Vt. 48; *Forest Glen, B. & T. Co. v. Gade*, No. 4868, this term. Not reported.

The master allowed damages at the rate of the rental value of the building for the time of the delay instead of at the rate specified as liquidated damages. The stipulated damages were ten dollars per day; the rental value found was a trifle less than five dollars and a half per day.

Undoubtedly, the master excluded the stipulated damages on the ground that they were so far in excess of the rental value, as to be penal and unconscionable.

In the recent case of *Poppers v. Meagher*, 148 Ill. 192, it was held that a stipulation to pay, as liquidated damages, the sum of thirty dollars per day for the time that possession of premises should be withheld after the expiration of the term of a lease, under which the monthly rental was \$500, it being proved that for the time of withholding possession, the rental value was at the rate of \$7,000 a year, was not unconscionable, but was reasonable. In that case, the stipulated damages exceeded the rental value about fifty-six per cent, while in this case, they were about eighty per cent in excess.

Whether the difference of twenty-four per cent would change the damages from such as were reasonable to such as were unconscionable, is a subject of curious inquiry rather than of practical value in this case, for the master

erred, if it were error, on the safe side, and allowed only actual damages.

It is, we think, plain from the evidence that the master had reasonable grounds for coming to the conclusion that the appellant was entitled to damages, and that there were not sufficient grounds to meet the rule applicable to master's findings, for overruling his report in that regard.

The appellant claimed much larger damages, but for the reasons already stated against disturbing the findings of a master, and the other reason, also before stated, that neither party objected before the master to his findings, we need not further consider his reasons for a greater allowance.

The record shows that the master gave notice to the parties on September 26, 1893, that his report was prepared and that they might have until October 2, 1893, in which to examine the same and file objections thereto; that he filed his report, with the evidence, in the Circuit Court on October 24, 1893, and that on the last named day for the first time, anywhere, there were exceptions to his report filed by both parties in the Circuit Court. There is no indication anywhere that objections by either party were ever presented to the master or considered by him, and such omission is not shown to have resulted from mistake or surprise. *Prince v. Cutter, supra.*

Upon the authority of the cases cited, and many others that can be found by reference to the text books, the correct practice would have been to have overruled the exceptions of both parties, so for the first time filed, and to have confirmed the master's report for want of objections having been presented to and considered by him. But, also, upon the merits, the report should have been confirmed.

The decree was further defective in not finding any amount to be due from the appellant to the original contractor. *Culver v. Elwell*, 73 Ill. 536; *Douglas v. McCord*, 12 Ill. App. 278.

Oberg, the original contractor, was the real debtor to appellee, and what was due to him from the appellant, was the fund out of which the appellee, the sub-contractor, was to be

paid, and was the only fund. It is indispensable that there should be a finding and a decree against both the owner and the original contractor. *Culver v. Elwell, supra.*

The statute in that regard is the same now, as when that decision was rendered. Gross' Stat., Chap. 65, Sec. 37; Hurd's Stat. 1891, Chap. 82, Sec. 45.

For the errors indicated, the decree of the Circuit Court will be reversed with directions to enter a decree in accordance with the findings of the master's report. Reversed with directions.

James H. Keeler v. Hiero B. Herr et al.

1. **INTEREST**—*Money Due on Writings*.—Money due on an instrument of writing bears interest.

2. **INSTRUCTIONS**—*When a Party Can Not Complain*.—A party can not complain of an instruction given on behalf of his adversary where a similar one has been given at his own request. If he has encouraged the court to give an instruction wrong in principle, he can not be heard to complain.

Memorandum.—Assumpsit. Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed June 4, 1894.

FLOWER, SMITH & MUSGRAVE, attorneys for appellant.

GREGORY, BOOTH & HARLAN, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellees built for, and under a written contract with, the appellant, 1,650 feet of dock along the Calumet river.

The work was completed November 21, 1890—except some posts omitted then by agreement, of the value of \$150—and should have been then paid for in full; but though the whole amount was \$11,812.50, only \$2,000 was paid, and this suit is to recover the residue.

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Keeler v. Herr.

The appellant endeavored to prove defects in the work, and there was conflicting testimony upon that subject.

It is not denied that the verdict is final upon the facts.

The money being due on an "instrument of writing," bore interest. *Morris v. Wibaux*, 47 Ill. App. 630.

The whole amount of the contract price unpaid, with interest, at the time of the trial, was about \$11,370, and the verdict of the jury was \$10,835, so that the jury must have allowed about \$535 for defects in the work. This statement makes it clear that the jury followed the instruction given at the request of the appellant, that "though the jury may believe, from the evidence, that there has been a substantial performance of the terms of the contract by the plaintiffs, yet, nevertheless, if the jury believe that the terms have not been fully complied with, the jury should allow to the defendant such sum or sums as, from the evidence, they may believe are reasonable and proper to enable the defendant to complete the dock in the manner stipulated for in the contract."

The appellant now complains of the use of the words "substantial performance" without explanation, in some of the instructions given for the appellees, but his own instruction is an answer to such complaint.

"A party can not complain of an instruction given on behalf of his adversary like one given at his own request." *Springer v. City of Chicago*, 135 Ill. 552.

"A party who has encouraged the trial court to give an instruction wrong in principle, can not be heard to complain of it." *McMahon v. Sankey*, 35 Ill. App. 341.

The usual practice at a trial being that each party hands up to the judge such instructions as the party desires, it is quite natural that when the judge sees the same expression used by both, that he should not give much care to the language.

There is no error and the judgment is affirmed.

Charles G. Elliott v. John B. Carlson.

1. **OWNER OF PREMISES—*Duty to Guard the Same.***—The law imposes no duty upon the owner of premises to so guard them that persons who for their own purposes go upon the same shall receive no harm.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed June 18, 1894.

JOHN W. BYAM and JOHN W. RICHEY, attorneys for appellant.

WILSON & ZOOK, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action for damages to the plaintiff arising from his walking off a platform around which there was no railing. It appears from the undisputed evidence in this case that there was no railing around the platform off which appellant walked, and this was open, undisguised, patent to view. Appellant walked over this platform when he went into the house, and if he did not see its condition or was heedless when he came out, it was his own fault.

If the stairway was unsafe because of the absence of a railing, appellant should not have used it if he did not care to incur the obvious risk.

The rule applicable to this case as to the risk assumed by parties who for their own purposes go upon the premises of others, will be found stated in *Chapin & Core v. Walsh*, 37 Ill. App. 526, and *Gibson, Parish & Co. v. Sziepienski*, 37 Ill. App. 601.

The judgment of the Circuit Court is affirmed.

Mumford v. Tolman.

William R. Mumford v. Daniel H. Tolman.54 471
157 258

1. JUDGMENT NOTES—*Cognovit—Release of Errors—Variance.*—A variance between the declaration and the note filed therewith, upon which a judgment was entered by confession, because the note described in the declaration is payable on demand, while the one upon which judgment was entered is payable on demand after date, is not such a variance as can be taken advantage of by motion after judgment. The error in this regard, if such it is, is released by the release of errors in the *cognovit*.

2. DEMAND—*When Not Necessary.*—It is not necessary, before bringing a suit upon a promissory note payable on demand, to make a demand of payment.

3. PROMISSORY NOTE—*Effect of Collateral Security.*—The fact that collateral security has been given for the payment of a promissory note in no wise interferes with the necessary characteristics of the instrument as a promissory note. The promise to pay is still certain and for a certain amount.

4. SAME—*Power to Confess Judgment—Attorney Fee—Usury.*—The fact that an instrument, upon which judgment has been entered, provides that an amount of five per centum may be added for attorney's fees, does not make the instrument usurious.

5. USURY—*Defense in the Appellate Court.*—The defense of usury can not be made for the first time in the Appellate Court.

6. JUDGMENTS BY CONFESSION—*Courts of Law Exercise Equitable Jurisdiction Over.*—Courts of law exercise equitable jurisdiction over judgments by confession for the purpose of doing justice, and will vacate, reduce or affirm them as appears to be just and equitable.

7. CONTRACTS IN WRITING—*Not Varied by Contemporaneous Parol Agreements.*—Written contracts can not be varied by proof of contemporaneous parol agreements.

8. OFFSET—*Damages from Fraudulent Practices.*—Damages arising from the fraudulent practices of one party, by which it is alleged the stock of another party in an incorporated company has been rendered worthless, can not be set off by such party as a defense to an action upon a promissory note due from him to the party guilty of such practices.

MR. JUSTICE GARY dissents.

Memorandum.—Motion to vacate judgment by confession. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed June 18, 1894.

Copy of the note upon which judgment was entered:

CHICAGO, Oct. 1, 1893.

On demand, after date, for value received, I promise to pay to the order of myself, \$8,500, with interest at the rate of seven per cent per annum, having deposited with the legal holder hereof, as collateral security, certificate for 100 shares of the Chicago Trust and Savings Bank stock, and

I hereby give the said legal holder, his, her or their assign or assigns, authority to sell the same, or any part thereof, on the maturity of this note, or at any time thereafter, or before, at public or private sale without advertising the same, or demanding payment or giving notice, and to apply so much of the proceeds thereof to the payment of this note as may be necessary to pay the same, with all the interest due thereon, and also to the payment of all expenses attending the sale of said collateral, and in case the proceeds of the sale of the same shall not cover the principal, interest and expenses, I promise to pay the deficiency forthwith after such sale, with interest at seven per cent per annum. Said legal holder hereof, his, her or their assigns, may purchase at any such sale. And it is hereby agreed and understood that if recourse be had to said collateral, or any money realized on sale thereof, in excess of the amount due upon the note, it shall be applicable to the payment of any other note or claim which the said legal holder may have against me, and in case of any exchange of, or addition to the collateral above named, the provisions of this note shall extend to such new or additional collateral, and so far as said collateral shall consist of what is usually called commercial paper, the said holder may, instead of selling the same, collect, with or without suit, or make such compromise as said holder may deem best with all or any of the parties thereto, and may extend the time of payment of any such paper, without thereby extending the time of payment of the indebtedness or liability aforesaid of myself; and after deducting the expense of such sales and collections, the said holder may apply the proceeds and the money aforesaid toward the payment of said indebtedness or liability, and if there be any excess over and above the amount of this note, realized by collecting said commercial paper, either with or without suit, then the legal holder hereof is authorized to apply such excess to the payment of any other note or claim which said legal holder may have against me.

And to further secure the payment of said amount, I hereby authorize, irrevocably, any attorney of any court of record to appear for me in such court, in term time or vacation, and confess a judgment without process in favor of the holder of this note, for such amount as may appear to be unpaid thereon, together with costs and five per centum attorney's fees, and also to file a cognovit for the amount thereof, with an agreement therein that no writ of error or appeal shall be prosecuted upon the judgment entered by virtue hereof, nor any bill in equity filed to interfere in any manner with the operations of said judgment, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution upon said judgment, and also to waive all benefit or advantage to which I may be entitled by virtue of any homestead or other exemption laws now or hereafter in force in this or any other State or territory, where judgment may be entered by virtue hereof. Hereby ratifying and confirming all that said attorney may do by virtue hereof.

W. R. MUMFORD. [SEAL.]

\$8,500 & Interest.

Indorsed on back: W. R. MUMFORD.

Mumford v. Tolman.

STATEMENT OF THE CASE.

On January 29, 1884, there was entered in the Circuit Court of Cook County a judgment by confession for \$8,612.96 and costs in favor of appellee and against appellant. The cognovit and judgment included \$395 attorney's fees.

Afterward, on the same date that the said judgment was entered, defendant moved the court to set it aside and for leave to plead. An order was entered staying execution until the further order of the court. On January 13th, leave was given to defendant to file affidavits in support of his motion. On February 3d the motion was heard and overruled. Thereupon the defendant prayed and was allowed an appeal to this court in bond of \$9,250.

On the hearing of said motion it appeared from affidavits filed that, on November 1, 1886, and prior thereto, Daniel H. Tolman was and had been the president, manager and owner of a majority of the stock of the Chicago Trust and Savings Bank; that he conducted the business of said bank in his own way. November 1, 1886, William R. Mumford had also become a stockholder of said bank and was at that time a director; that on November 1, 1886, Tolman induced Mumford to purchase 100 shares more of the capital stock owned by him, at the price of \$13,000, and persuaded Mumford to give his note with the stock purchased as collateral; that this note was reduced between that date and June 21, 1889, to \$10,000, and was renewed for that amount; that between that date and October 1, 1892, it had been again reduced and was again renewed for \$8,500, and that \$600 had been paid on account of the principal thereof since, thus showing that since November 1, 1886, Mumford has paid to Tolman \$5,100, and in addition thereto interest on the \$13,000, less such sums as were paid thereon from time to time, at the rate of seven per cent per annum.

It also appears from this record that on October 27, 1888, the directors of the Chicago Trust and Savings Bank applied \$26,000 of the earnings of the said bank toward the unpaid subscriptions of stockholders for the increased stock

made in 1886; that on September 27, 1889, they appropriated \$24,000 more of such earnings. . On July 19, 1890, \$50,000. On November 3, 1891, \$100,000, making in all \$200,000. Both Mumford and Tolman were directors and assisted in passing the resolutions.

The 100 shares of said stock so sold by Tolman to Mumford and retained by Tolman as collateral, were one-fiftieth of the entire capital stock; and one-fiftieth, therefore, of the \$200,000, or \$4,000 of these earnings of the bank, was applied to pay the unpaid subscription of Daniel H. Tolman for part of this very stock. This \$4,000 so applied was part of the earnings of this 100 shares of stock. The obligation on the subscription was the personal obligation of Tolman.

In addition, it is alleged by Mumford that at the time he made the purchase of the stock from Tolman, Tolman represented to him that the bank was increasing its business and its profits very rapidly, and that by reason of the earning capacity of said stock, it was then worth \$130 per share, and in a short time it would be worth \$200 per share; that he told Tolman that he did not have any more money to invest, no matter how valuable the stock might be; that thereupon, Tolman, to induce him to take the stock, guaranteed that he should never lose anything on account of the purchase; that he, Tolman, would carry the note along until it should be paid by dividends out of the stock, and that he, Mumford, should never be called upon to pay the indebtedness except out of the dividends; that it was by reason of this assertion and the guaranty of Tolman that he was induced to purchase said stock on these terms.

He further alleges that Tolman, by his fraudulent actings and doings in the management of the Chicago Trust and Savings Bank to his own personal interest, and by means of the conversion to his own use of the funds, property and money of said bank, has rendered said stock practically worthless; that in September, 1893, Tolman decided to have the bank wind up its affairs, and that ever since that time it has been engaged in winding up its affairs; and that in November, Tolman told the stockholders he did not think they would get much for their stock; that this state of

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affairs was brought about by the mismanagement, misappropriation and conversion of the funds of said bank by Tolman, and that upon a just and true accounting between said Tolman and the bank, it would be found that he is indebted to said bank for the moneys and property misappropriated, and liabilities incurred on account of his fraud and mismanagement, upward of the sum of \$500,000, for which a bill in chancery is now pending; that the status of the chancery suit has been established by order of court entered by agreement of all parties, and Tolman has given bond to pay the bank, and Mumford as intervening petitioner, any sum that may be found due them on a final decree; that an accounting, not only between the bank and said Tolman, but between Mumford, as intervening petitioner, and said Tolman and said bank, is involved in that proceeding, and that the alleged controversy here is but part and parcel of that accounting.

These allegations of Mumford were denied by Tolman.

Appellant insists:

1. "There is a fatal variance between the note declared on and the document offered in evidence, which contains the power to confess judgment, and that therefore the judgment is void.

2. That the document offered in evidence as the basis of this proceeding is not a negotiable instrument, and therefore a nullity.

3. That the document offered in evidence as the basis of this proceeding is usurious on its face.

4. That courts of law exercise an equitable jurisdiction over judgments entered by confession for the purpose of doing justice, and will vacate the same upon motion, or open the case and give the defendant leave to plead.

5. That the affidavit of Mumford, if true, together with the admitted facts, shows an absolutely good defense."

APPELLANT'S BRIEF, WEIGLEY, BULKLEY & GRAY,
ATTORNEYS.

In order to maintain a suit upon a written contract the declaration must set forth the contract *in haec verba* or

according to its legal effect. In this case it was attempted to declare upon a note according to its legal effect, but the legal effect of the note declared upon and the legal effect of the document offered in evidence, are entirely different. One is payable immediately, and might have been enforced the day of its date. The other was payable when demanded after the date of its execution. In the note declared upon, if demand had been made immediately, the statute of limitations would run in ten years from that date. In the note offered in evidence no demand could have been made before the next day at the shortest, and the statute of limitations would not run in any event for a day longer than in the other.

This variance, then, is material, and one of substance. In support of this proposition we cite *Spangler v. Pugh*, 21 Ill. 85; *Davidson v. Johnson*, 31 Ill. 523; *Taylor v. Riddle*, 35 Ill. 567; *Germania Fire Ins. Co. v. Leiberman*, 58 Ill. 117; *Sheehy v. Mandeville*, 7 Cranch, 208; *Chase v. Dana*, 44 Ill. 262; *Carpenter v. First National Bank*, 19 Brad. 549.

Contracts made at the same time as a promissory note, and memoranda made contemporaneously with promissory notes, are held to be part of the transaction, and in many instances control the notes. *Shaw v. M. E. Society*, 8 Metc. 223; *Costello v. Crowell*, 127 Mass. 293; *Bailey v. Cromwell*, 3 Scam. 71; *Duncan v. Charles*, 4 Scam. 561; *Davis v. McVickers*, 11 Ill. 327; *Lowe v. Bliss*, 24 Ill. 168; *Bradley v. Marshall*, 54 Ill. 173; *Smith v. Riddell*, 87 Ill. 165; *Potter v. Gronbeck*, 117 Ill. 404.

It is an established rule of decision in this State that the courts will exercise an equitable jurisdiction over judgments entered by confession. *Walker v. Ensign*, 1 Brad. 113; *Lake v. Cook*, 15 Ill. 353; *Heeney v. Alcock*, 9 Brad. 434; *Condon v. Besse*, 86 Ill. 159; *Fleming v. Jencks*, 22 Ill. 475; *Lanyon v. Lanz*, 43 Ill. App. 654.

APPELLEE'S BRIEF, MOSES, PAM & KENNEDY, ATTORNEYS.

It is a well known principle that parol evidence is not admissible to show a contract different from that specified

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in the note. It is an inflexible rule that the maker of a promissory note absolute on its face can not show as a defense thereto, even against the payee, an oral contemporaneous agreement which makes the note payable only on a contingency. *Walker v. Crawford*, 56 Ill. 444; *Johnson v. Glover*, 121 Ill. 286; *Mosher v. Rogers*, 117 Ill. 449; *Courtney v. Hogan*, 93 Ill. 101; *Worden v. Salter*, 90 Ill. 160; *Wilson v. Roots*, 119 Ill. 384; *Black v. Wabash Ry. Co.*, 111 Ill. 361; *Hardt v. Brown*, 113 Ill. 479; *Heisen v. Heisen et al.*, 145 Ill. 669; *Schultz v. Plankinton Bank*, 141 Ill. 116.

A promissory note, as against the maker, payable on demand, can be prosecuted to judgment without averring or proving a demand. *Hunt v. Divine*, 37 Ill. 137-144; *Butterfield v. Kinzie*, 1 Scam. 445; *Armstrong v. Caldwell*, Id. 546; *Wallace v. McConnell*, 13 Pet. 136; *Wood v. Savings, etc.*, 41 Ill. 267.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It is insisted that there is a variance between the declaration and the note filed therewith, upon which the judgment was entered, because the note described in the declaration is payable on demand, while the note upon which judgment was entered is payable on demand after date.

If this constitutes a variance it is not such an one as could be taken advantage of by motion after judgment; moreover, the error in this regard, if such there was, is one which is released by the release of errors. *Hall v. Jones*, 32 Ill. 38; *Hall v. Hamilton*, 74 Ill. 437; *Frear v. Commercial National Bank*, 73 Ill. 473; *Carpenter v. Bank*, 119 Ill. 356.

The motion to set aside the judgment did not proceed upon the ground of any such variance; if the attention of the court below had been called thereto, it could have been instantly removed by amendment.

It is also insisted that the note was not due when the judgment was entered thereof, because no demand had been made for the payment of the same.

It is not necessary before bringing suit upon a note pay-

able on demand, that demand of payment should have been made. *Butterfield v. Kinzie*, 1 Scam. 445; *Hunt et al. v. Divine*, 37 Ill. 137.

The fact that, as appears from the face of the note, collateral security was given for its payment, did not destroy its negotiability. The giving of such collateral in no wise interfered with the necessary characteristics of the instrument as a promissory note. The promise to pay was still certain and for a certain amount.

The fact that the instrument provided that if the collateral proved insufficient for the payment of the note, the maker would pay the deficiency remaining after an exhaustion of the collateral, neither increased nor decreased the responsibility of the maker, or rendered his liability in any respect less certain and definite. *Valley Bank of Chambersburg v. Crowell et al.*, 148 Pa. St. 284.

Nor did the fact that the instrument upon which judgment was entered provided that in case of confession of judgment upon such note, an amount of five per centum might be added for attorney's fees, make the instrument usurious. Undoubtedly, if such agreement had been inserted as a cover for usury, it would have rendered the note usurious; but appellant, in his affidavit setting forth the defense he claims to have to said note, and the reasons existing why judgment entered thereon should be set aside, makes no mention of usury and does not pretend that the note or the judgment entered thereon is in any way or wise tainted with usury.

This defense, so far as appears from the record, is made for the first time in this court. Had appellant set up in the Circuit Court the defense of usury, that court might, if convinced that the note was usurious, have given him the benefit of the defense provided by the statute therefor. *Fleming v. Jenks*, 22 Ill. 425.

Courts of law do exercise an equitable jurisdiction over judgments entered by confession, for the purpose of doing justice, and will vacate, reduce or affirm the same as appears to such court to be just and equitable.

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From the affidavit of appellant it appears that this note was given for stock in a bank controlled by appellee; that when the stock was purchased and the note given, appellee made glowing representations as to the profits likely to be derived by appellant from a purchase of said stock; and, moreover, promised that he, appellant, should never lose anything by reason of such purchase, and should not be called upon to pay the note except out of dividends earned upon the stock. These promises were entirely verbal, and it is manifest can not be availed of by appellant as a defense to this note.

Appellant made a plain, certain, definite written contract; this contract he now seeks to vary by proof of a contemporaneous verbal agreement, by which this note is to be changed to an indefinite instrument, payable, if at all, only out of a particular fund, to be derived from particular earnings, and in no event is the instrument to subject its maker to loss.

Written contracts can not, by proof of contemporaneous parol agreements, be so varied. *Walker v. Crawford*, 56 Ill. 444-448; *Johnson v. Glover*, 121 Ill. 283; *Mosher v. Roberts*, 117 Ill. 446; *Schultz v. Plankinton Bank*, 141 Ill. 116; *Heisen v. Heisen*, 145 Ill. 658; *McGinnis v. Fernandez*, 126 Ill. 228-232.

The further allegations that appellee has, by fraudulent doings, rendered the stock purchased by appellant practically worthless, and that the affairs of the bank are being wound up by a court of chancery, in which proceeding appellant, as an intervening petitioner, is endeavoring to recover a large sum from appellee on account of his fraudulent proceedings in the management of said bank, constituted no defense at law.

Damages arising from the fraudulent practices of appellee, by which it is alleged the stock of appellant has been rendered worthless, can not be set off as a defense to an action upon a promissory note.

The affidavits filed by appellant failed to show either a defense at law, or any equitable ground for setting aside the judgment.

What remedy appellant may have in other proceedings is a matter upon which we are not called to express an opinion.

The order of the Circuit Court refusing to set aside the judgment is affirmed.

GARY, J. I dissent from the position that a variance may not be objected to in the court below; also that a release of errors in the cognovit has any effect in that court.

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157s 9.

David M. Hart v. Washington Park Club.

1. NEGLIGENCE—*By Omission*.—Negligence by omission can only exist where a duty is not performed.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed June 18, 1894.

APPELLANT'S BRIEF, ROSENTHAL & HIRSCHL, ATTORNEYS.

If the court rejects the maxim *res ipsa loquitur* it will be like setting a premium upon negligence, and exposing the helpless public without redress to an untold number of dangers. We find the maxim explained and applied (without reference now to railroad cases, such as *I. C. R. R. v. Phillips*, 49 Ill. 234) in the following, among other cases:

It applies "even where no special relation like that of passenger and carrier exists between the parties." *North C. S. R. Co. v. Cotton*, 140 Ill. 486.

Employe injured by breaking of the winch of a windlass at which he was working. *Hamilton v. Branfoot*, 48 Fed. Rep. 914.

Building falls upon a passer-by. *Mullen v. St. John*, 57 N. Y. 568 (15 Am. Rep. 530).

A box falls while being hoisted. *Lyons v. Rosenthal*, 11 Hun, 46.

A berth in a steamboat falls. *Smith v. British Packet Co.*, 86 N. Y. 408.

Hart v. Washington Park Club.

An elevator falls upon plaintiff. Gerlach v. Edelmeyer, 47 N. Y. Sup. Ct. 292.

Packing cases fall upon the plaintiff. Briggs v. Oliver, 4 Hurlst. & Colt. 407.

A boiler explodes and injures a person lawfully present who sustains no relation of employment or duty to the person controlling the boiler. John Morris Co. v. Burgess, 44 Ill. App. 27.

A coach is upset and injures a passenger. Payne v. Halstead, 44 Ill. App. 97.

A piece of iron falls from an elevated railroad track. Volkmar v. Manhattan Ry. Co., 134 N. Y. 418-31, N. E. Rep. 870.

An omnibus horse kicks a passenger; the owner has burden of proof to explain the reason and show absence of negligence. Simpson v. The London, etc., Co. Law Reports, 8 Com. Pleas 390 (6 Moak, 173).

Negligence is presumed from horse running unattended. Its owner should explain. Strup v. Edens, 22 Wis. 432; Hill v. Scott, 38 Mo. App. 370; Unger v. 42d Street, etc., Co., 51 N. Y. 497.

CRATTY BROS., JARVIS & CLEVELAND, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The declaration of the appellant is as follows:

“For that, whereas, heretofore, on the day commonly known as Derby Day, on, to wit, the 25th day of June, 1893, said defendant in said county, on the certain race course then and there in its possession, gave and conducted a public exhibition of horse racing and thereto invited the public at large, charging and receiving an admission fee, plaintiff paid said fee and attended said exhibition, and was then and there, and at all times thereabouts, in the exercise of all reasonable and ordinary care, and lawfully in and upon the ground in defendant's possession and control, set aside by defendant for the use of the spectators at said races,

and plaintiff alleges that it then and there became, and was the duty of defendant to use all reasonable and ordinary care to keep said grounds in a reasonably safe and suitable condition for said spectators, and therein defendant made default, and so carelessly and negligently kept said grounds, that a horse drawing a vehicle, ran unguarded, unattended and unhindered, from a cause or causes which, upon diligent inquiry, plaintiff has not been able to learn, but which are to defendant well known, through and among the spectators, and in so doing ran upon and against the plaintiff, hereby," etc.

On demurrer final judgment was rendered for the appellee, and from that judgment this appeal is prosecuted.

We know nothing judicially of the arrangements for the accommodation of spectators at horse races. If the horses run around upon a road separating an inner inclosure from an outer one, and if within the inner inclosure are spectators, some on foot, and some in carriages, it is not apparent how the proprietors of the race course could hold the horses of the spectators. In the nature of things some one in charge of any carriage would be also in charge of the horse or horses attached. Unless it be negligence to admit at all spectators in carriages, which, we suppose, would not be contended, there could be no neglect charged upon the appellee because a horse ran away.

The description in the declaration of a race course and what happens there, is not sufficient to show any duty of the appellee, and the averment of duty is idle. *Angus v. Lee*, 40 Ill. App. 304.

Negligence by omission can only be where a duty is not performed. *C. & W. I. v. Roath*, 35 Ill. App. 349.

The judgment is affirmed.

Nat. Live Stock Bk. v. Platte Valley State Bk.

**National Live Stock Bank v. Platte Valley State Bank,
Union Stock Yards National Bank and
F. A. Halsey.**

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108	394

1. **INTERPLEADER—***Upon What the Equitable Remedy Depends.*—The equitable remedy of interpleader depends upon the existence of four elements. First: The same thing, debt, or duty must be claimed by both or all the parties against whom the relief is demanded. Second: All their adverse titles or claims must be dependent, or be derived from a common source. Third: The person asking the relief—the plaintiff—must not have or claim any interest in the subject-matter. Fourth: He must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position merely of a stakeholder.

2. **SAME—***What Will Deprive a Depositary of his Rights.*—The independent liability that will deprive a depositary of the right to require rival claimants to interplead, may arise either by express acknowledgment of the title of one of the claimants, or out of such contractual relations as will bind him, as upon an independent undertaking, without reference to his possible liability to the other claimant.

3. **SAME—***The Case Tendered by the Bill.*—The case tendered by every bill of interpleader ought to be, that the whole of the rights claimed by the defendants be properly determined by litigation between them, and that the plaintiff is not under any liabilities to either of the defendants beyond those which arise from the title to the property in contest.

4. **SAME—***Bill of, Favored in Equity.*—A bill of interpleader will be sustained, notwithstanding the party may protect himself by defending in the suit previously begun, and in all others that may be brought against him. The reason for the remedy is the risk of vexation and expense from two or more suits by different parties for the recovery of the same thing.

Memorandum.—Bill of interpleader. Appeal from the Circuit Court of Cook County; the Hon. SAMUEL P. McCONNELL, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed May 28, 1894.

The opinion states the case.

COY & BROCKWAY, attorneys for appellant.

PECKHAM & BROWN, attorneys for the Platte Valley State Bank, appellee.

BRIEF OF UNION STOCK YARDS NATIONAL BANK, APPELLEE,
WALKER, JUDD & HAWLEY, ATTORNEYS.

The principle is well established that the holder of a chattel mortgage may follow the property beyond and out of the State where the mortgage was given, and recover it even in the hands of an innocent purchaser for value. *Hendley v. Harris*, 29 Pac. Rep. 1145.

The law of the place of contract, when this is also the place where the property is, governs as to the nature, validity, construction and effect of a mortgage, which will be enforced in another State as a matter of comity, although not executed or recorded according to the requirements of the law of the latter State. *Jones' Chat. Mort.*, page 299.

If the holder of property has recently come from an adjoining State, there may be a mortgage upon the property in that State, and a purchaser or creditor must exercise his diligence by inquiring there whether the property is incumbered, just as, when the owner has recently removed from another part of the same State, the purchaser or creditor is bound to inquire, at such former residence of the owner, for incumbrances there recorded. *Jones' Mortg.*, 260; *Offutt v. Flagg*, 10 N. H. 47; *Langworthy v. Little*, 12 Cush. 111; *Smith v. McLean*, 24 Ia. 323; *Kanaga v. Taylor*, 7 Ohio St. 134; *Hoit v. Remmick*, 11 N. H. 285; *Whitney v. Haywood*, 6 Cush. 82; *Barrows v. Turner*, 50 Me. 127; *Hicks v. Williams*, 17 Barb. 523; *Cool v. Roche*, 20 Neb. 550; *Feurt v. Rowell*, 62 Mo. 525; *Mumford v. Canty*, 50 Ill. 371.

A chattel mortgage, valid under the law of the State where executed, will be so held by the courts of a sister State to which the property may be removed. 2 *Hilliard on Mortgages*, 412; *Blystone v. Burgett*, 10 Ind. 28; *Martin v. Hill*, 12 Barb. 633; *Barker et al. v. Stacy*, 25 Miss. 477; *Ferguson v. Clifford*, 37 N. H. 87; *Jones v. Taylor*, 30 Vt. 42.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree sustaining the demurrer of

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the appellee, the Platte Valley State Bank, to the bill of appellant, and dismissing the bill for want of equity.

The appellant is a banking corporation doing business at the stock yards, in Chicago, and the appellee, the Platte Valley State Bank, and the Union Stock Yards National Bank of South Omaha, are banking corporations located in the State of Nebraska.

According to the allegations of the bill, as amended, one F. A. Halsey, who was also made a party defendant to the bill and was defaulted, by his agents, deposited with appellant the sum of \$5,963.18 to be credited to the appellee, the Platte Valley Bank, and to be remitted or paid to said Platte Valley Bank upon presentation of a draft to be drawn by it.

When the money was so deposited and credited, the agents of Halsey requested the appellant to immediately notify said Platte Valley Bank of the deposit and credit having been made, and notification thereof was accordingly, and on the same day, given by both telegram and letter.

It was further alleged, upon information and belief, that the Platte Valley Bank, acting upon said telegram and letter, and prior to any further advice from the appellant concerning the money so credited, paid out, to an extent unknown to appellant, certain sums of money upon orders therefor drawn by said Halsey, and that said Platte Valley Bank does now, and has ever since the day of such deposit, claimed of appellant the entire sum so deposited and credited, and that the entire sum so deposited and credited still remains in the hands of the appellant.

It is further alleged that four days after said deposit was made, and before the receipt by appellant of any draft or other request by the Platte Valley Bank, or by said Halsey, the Union Stock Yards National Bank of South Omaha, made known to appellant that it claimed said fund of \$5,963.18, asserting that the same was the proceeds of sale of certain cattle owned by said Halsey and mortgaged to said Union Stock Yards Bank, and wrongfully converted by Halsey without its knowledge or consent, and that said Platte Valley Bank had notice of such mortgage and wrong-

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ful conversion, and of the disposition of the proceeds as aforesaid; that said Union Stock Yards Bank claims said money, and has notified appellant not to pay the same to the Platte Valley Bank, and has begun a suit at law in attachment to obtain said fund from appellant as garnishee, and threatens other suits at law and in equity against appellant; that both the Platte Valley Bank and the Union Stock Yards Bank claim from appellant the said specific fund of \$5,963.18; that both of said banks' claims against appellant arise out of the depositing, by Halsey, of said fund with appellant; that the appellant is in danger of being harassed by other suits of said claimants; that appellant is and always has been willing to pay said fund to whomsoever is lawfully entitled thereto, and offers to bring the same into court; that appellant fears it can not be protected by the judgment that may be recovered against it in the suit at law that has been begun, or in other suits that may be begun against it by either of the rival claimants to said fund, and therefore prays that the said several claimants to said fund may be required to interplead and settle their demands between themselves; that appellant has no interest in the subject-matter and is not colluding with either of said claimants touching the matter in controversy, but exhibits its bill of interpleader merely that it may be protected in the payment of said fund, and avoid being harassed by the claimants thereto, and agrees to pay the same to whichever claimant may be adjudged to be entitled thereto, and prays for an injunction against the prosecution of said attachment proceedings and from other suits being begun against appellant for the recovery of said money.

It is laid down in 3 Pomeroy's Equity Jurisprudence, Sec. 1322, that the equitable remedy of interpleader depends upon and requires the existence of the four following elements:

“First. The same thing, debt, or duty must be claimed by both or all the parties against whom the relief is demanded.

Second. All their adverse titles or claims must be dependent, or be derived from a common source.

Third. The person asking the relief, the plaintiff, must not have nor claim any interest in the subject-matter.

Fourth. He must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position merely of a stakeholder."

Counsel for the appellee, Platte Valley Bank, contend *seriatim*, that the appellant's case, as made by his bill, fails to meet the first, second and fourth of the essential conditions so laid down by Mr. Pomeroy.

What is claimed by the appellees, the Platte Valley Bank and the Union Stock Yards Bank, is the chose in action—the debt—the credit that was given and arose from the depositing of the money with the appellant.

The identical money that was deposited is not—and for the reason that the title to it passed to the appellant, and its identity became lost when the deposit was made could not—be the subject of conflicting claims; but the credit, or in other words, the debt, is what is claimed, and it is the same debt, and not a different one, that is claimed by both claimants.

It would be difficult to state a subject of dispute that did not possess a bodily existence, about which there could be less difficulty of identification.

The only contention against the existence of the second condition stated to be essential to the right to maintain interpleader, is based upon the showing by the bill of payments of money by the Platte Valley Bank, acting upon the telegram and letter of appellant, on orders drawn on it by Halsey.

The liability of appellant to the Platte Valley Bank does not depend upon whether that bank paid Halsey's orders or not, but exists, if at all, because of receiving and crediting the deposit for the account of that bank.

Neither the appellant nor the Platte Valley Bank, were under any obligation to each other as to what disposition the latter should make of the money credited to it.

It may or may not happen that the Platte Valley Bank has suffered loss through reliance upon the fund which was deposited with the appellant to its credit.

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Such an occurrence in no manner affects the question of whether the adverse claims to that fund are dependent on or derived from a common source.

If it may hereafter be held that the Platte Valley Bank has a claim superior to the Union Stock Yards Bank on the deposited fund, to the partial extent of payments made in reliance upon the credit given, or to the whole extent of the entire deposit, the allowance of such a claim would arise out of and rest upon the fact of the credit that was given, and in either case would have for its foundation the same source that its claim for the entire fund now has, viz., the deposit by Halsey and the credit thereof that was given by the appellant, to the Platte Valley Bank.

And the claim of the Union Stock Yards Bank, if it shall prevail, will rest upon the same source, to wit, the deposit by Halsey.

The common source of both claims is Halsey.

The appellant further contends that the bill fails to show a case that is within the third and fourth of the conditions laid down by Mr. Pomeroy, as essential to a bill of interpleader, for the reason that it appears that appellant has incurred an independent liability to the Platte Valley Bank, and therefore has an interest in the fund inconsistent with the indifference of a mere stakeholder.

We do not so consider it. The only theory upon which it can be argued that an independent liability arose from the appellant to the Platte Valley Bank grows out of the fact of the deposit of the fund with appellant by Halsey, to the credit of the Platte Valley Bank, and the consequent relation of debtor and creditor thereby created. The liability of appellant, whatever and to whomsoever it was, arose from the act of deposit and acceptance of the fund. It did not spring from the telegram and letter of notification. Such papers did not constitute the contract, but were mere evidences, of it; neither did they increase appellant's liability or affect it in any way. The liability of the appellant would have been just the same to the Platte Valley Bank without any such notification having been given, as with it.

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The independent liability that will deprive a depositary of the right to require rival claimants to the deposit to interplead, may arise either by express acknowledgment of the title of one of the claimants, or out of such contractual relations as will bind him, as upon an independent undertaking, without reference to his possible liability to the other claimant. 3 Pomeroy's Equity Juris., Sec. 1326.

Under such circumstances he does not stand indifferent between the claimants, since one of them has a valid legal demand against him at all events.

What is there in the mere fact of notification of deposit and credit, such as the bill alleges, that constitutes an undertaking by the appellant to the Platte Valley Bank independent of the transaction with the agents of Halsey?

The notification was given before the appellant was informed of the claim of the Union Stock Yards Bank to the deposit, and it should not be construed into a contract to pay the money notwithstanding an adverse claim to it, of which no notice had been given.

The notification was merely of a fact, viz., the deposit and the credit, and there was in it no element of new contract, or independent undertaking, with reference to the subject, *i. e.*, the deposit.

The question here is merely whether the statements in the bill constitute such a case as entitles the appellant to the protection afforded by a bill of interpleader, and we have endeavored to show that all the conditions required to maintain such a bill exist in what is alleged in the bill, and that the demurrer ought to have been overruled and the rival claimants required to interplead.

As was stated by Lord Chancellor Cottenham, in *Crawshay v. Thornton*, 2 Mylne & Craig, 1 (14 Eng. Chan. 1):

“The case tendered by every such bill of interpleader ought to be, that the whole of the rights claimed by the defendants may be properly determined by litigation between them, and that the plaintiffs are not under any liabilities to either of the defendants beyond those which arise from the title to the property in contest.”

That a bill of interpleader will be sustained notwithstanding the suggestion that appellant might protect himself by defending in the suit already begun, and in all others that may be brought against him, has been decided by this court heretofore. *Curtis v. Williams*, 35 Ill. App. 518; *Livingston v. Bank of Montreal*, 50 Ill. App. 562.

As said in the latter case: "The true reason for the remedy is the risk of vexation and expense from two or more suits by different parties for the recovery of the same thing."

The appellant having only the legal title and possession of the fund or money to which conflicting claims derived from a common source are set up, and being under no independent liability concerning the fund, ought to be permitted to interplead the parties, bring the money into court, and go free, leaving the rival claimants to settle their contest in a proceeding wherein a final judgment will be a termination of the controversy between all parties.

The decree of the Circuit Court will therefore be reversed and the cause remanded.

Frank Becker v. People ex rel. Wilson.

Henry E. Wilmott v. People ex rel. Murphy.

1. PRACTICE IN APPELLATE COURT—*No Assignment of Errors.*—In the absence of assignment of errors, an appeal will be dismissed.

Memorandum.—Appeals from the Criminal Court of Cook County: the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1894, and dismissed. Opinion filed May 28, 1894.

RILEY & AMOS, attorneys for appellant.

JACOB J. KERN, state's attorney, for appellees; T. A. Coffey, of counsel for the people.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Before we observed that no assignments of error were on or attached to the records in these cases, as required by

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rule 15, we had studied the questions involved with much care, but we can not say with what result, as for want of such assignments we can only dismiss the appeals. *Ditch v. Sennott*, 116 Ill. 288, has been followed in many cases in this court. It may be said that it would be little trouble to the court to call the attention of counsel to the omission that they might supply it, but we may not make such a precedent as will give counsel cause to complain if we do not assist them in their work.

The appeals are dismissed.

Ward Hunt, Receiver, etc., v. James H. Gilbert et al.

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1. FOREIGN RECEIVERS—*Privileges by Comity*.—The privilege of a foreign receiver to exercise extra-territorial powers, is derived wholly from the doctrine of comity.

2. COMITY—*Usually Accorded to Foreign Receivers*.—The favor or courtesy known as comity, is usually accorded to foreign receivers, either to sue in our courts, or to hold and deal with property located here, over which they have been appointed, where the result of so doing involves no violation of our domestic policy, or conflict with the rights of creditor citizens of our own State.

3. SAME—*The Doctrine Defined*.—It is not the policy of this State to permit receivers of foreign corporations to remove from its jurisdiction property of such corporations, so as to require our citizens, who have claims against them, to go into foreign jurisdictions to assert their rights.

4. SAME—*Extent of the Doctrine*.—The doctrine of comity has never been extended so as to deny to citizens that duty to protect them in the assertion of their claims against insolvent foreign corporations, by retaining within its jurisdiction sufficient property until their just claims have been satisfied.

5. RECEIVERS—*Rights in Illinois—When Appointed in Other States*.—A receiver of a foreign corporation, appointed by a court within the State where the corporation is organized, does not, by taking possession of personal property of the corporation found here, obtain such a title thereto as will prevent a domestic creditor from realizing his claim out of said property by attachment proceedings against the same, after the receiver has taken possession, and with the knowledge of such possession.

6. ASSIGNMENT FOR THE BENEFIT OF CREDITORS—*No Extra-Territo-*

rial Effect.—A voluntary assignment by the foreign owner of property has no extra-territorial effect as against creditors, resident within the State where the property is located.

Memorandum.—Replevin. Appeal from the Superior Court of Cook County; the Hon. GEORGE F. BLANKE, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed May 28, 1894.

APPELLANT'S BRIEF, ELBERT H. GARY AND PARKE E. SIMMONS, ATTORNEYS.

The comity of nations which is a part of the common law, allows a certain effect here to titles derived under, and powers created by the laws of other countries, and from such comity the titles of foreign statutory assignees are recognized and enforced here, when they can be without injustice to our own citizens, and without prejudice to the rights of creditors pursuing their remedies here under our statutes; provided, also, that such titles are not in conflict with the laws or the public policy of our State. *Peterson v. Chemical Bank*, 32 N. Y. 21.

The recognition of such rights is, as stated by Story on Conflict of Laws, Sec. 420, 8th Ed., in commenting on the case of *Abraham v. Plestoro*, referred to in *In re Waite*, "a surrender of the principle; for no one will contend that the assignees can sue either in law or in equity in our courts, unless they possess some title under the assignment."

"Where there has been an actual transfer of possession, the transfer will be upheld everywhere." *Burrill on Assignments*, 6th Ed., Sec. 281.

Aside from the considerations already given, it is the policy of our laws to broaden, rather than to limit the doctrine of comity. They extend to foreign corporations the same rights which our domestic corporations enjoy. *Rev. Stat., Ch. 33, Par. 2*; *Santa Clara Female Academy v. Sullivan*, 116 Ill. 373.

APPELLEES' BRIEF, SMITH, HELMER & MOULTON, ATTORNEYS.

The question involved in this case is whether a receiver of a foreign corporation, appointed by a foreign court, can,

by merely taking possession of assets of said corporation found in this State, obtain such a title thereto as will prevent a domestic creditor from realizing his claim out of said assets by attachment. It is not a question of the foreign receiver's general right to sue, but of his title to the goods in controversy in this case. We state the following propositions :

I. A receiver has of right no extra-territorial powers of official action.

II. By comity he may exercise such extra-territorial powers, but only where the rights of domestic creditors will not be prejudiced or injured thereby.

These propositions are so universally accepted as to need no discussion. We append the following citations : Sercomb v. Catlin, 128 Ill. 556; Woodward v. Brooks, 128 Ill. 222; Comstock v. Frederickson (Minn.), 53 N. W. Rep. 713; Falk v. Janes (N. J.), 23 Atl. Rep. 813; Winans v. Gibbs & Sterrett Mfg. Co. (Kans.), 30 Pac. Rep. 163; Boulware v. Davis (Ala.), 8 So. Rep. 84; Catlin v. Wilcox S. P. Co. (Ind.), 24 N. E. Rep. 250; Willitts v. Waite, 25 N. Y. 577; High on Receivers, Secs. 239 to 241.

The protection which the State affords to the rights of domestic creditors will be applied, although the foreign receiver is in actual possession of the property situated in this State, before the domestic creditor has acquired a lien thereon by attachment or otherwise.

The State has a duty to protect its citizens as long as goods are within its jurisdiction, whether in the possession of the receiver or not. Willitts v. Waite, 25 N. Y. 577; Rhawn v. Pearce, 110 Ill. 350; Woodward v. Brooks, 128 Ill. 222; May v. First Nat'l Bk. Attleboro, 122 Ill. 551; Lipman v. Link, 20 Ill. App. 359; Catlin v. Wilcox Silver Pl. Co., 24 N. E. Rep. 250.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This appeal raises the question whether a receiver of a foreign corporation, appointed by a court within the State

where the corporation was organized, does, by coming into this State and taking possession of personal property of the corporation found here, obtain such a title thereto as will prevent a domestic creditor from realizing his claim out of said property by attachment proceedings begun against the same, as the property of the corporation, after the receiver has taken possession, and with the knowledge of such possession.

The appellant was appointed receiver of the Manitou Mineral Water Company, a Colorado corporation, by the United States Circuit Court for the District of Colorado.

At the time of his appointment as receiver, the company had certain personal property in Chicago, which was being used in its mineral water supply business, and the receiver subsequently took possession of the property.

There were resident creditors of the company in Chicago, who attached the same property, and the appellee, the sheriff of Cook county, took possession of the same, from the receiver, under an attachment writ.

A replevin suit was then begun against the sheriff by the receiver.

A return of the property replevied was ordered by the Circuit Court, upon sustaining a demurrer to the replication of the appellant to the pleas of the appellees, and the question heretofore stated is now presented to this court.

This is not the case of a voluntary assignment by the owner of the property. Although the record is destitute of statement as to the character of the proceedings wherein the receiver was appointed, it is apparent that the appointment was by the court and was involuntary as to the corporation.

The privilege of a foreign receiver to exercise extra-territorial powers, is derived wholly from the doctrine of comity.

The favor, or courtesy, known as comity, is usually accorded to foreign receivers, either to sue in our courts, or to hold and deal with property here located, over which they have been appointed, where the result of so doing would

involve no violation of our domestic policy, and would not conflict with the rights of creditor citizens of our own State.

But it is not the policy of this, or any other State, so far as we are advised, to permit receivers of foreign corporations to come within its limits and remove from our jurisdiction the property here located of such corporations, and thereby require our citizens who have claims against them to go into foreign jurisdictions to assert their rights.

The State owes a duty to its citizens to protect them in the assertion of their claims against such insolvent bodies, by retaining within its own jurisdiction and control such of their property as may be here located until the just claims and rights of its own citizens have been satisfied.

The doctrine of comity has never been so extended as to deny that duty.

The case of *Heyer v. Alexander*, 108 Ill. 385, is in point.

The controlling question in that case was whether a voluntary deed of assignment, made in Missouri, and valid there, by a debtor citizen of that State, for the benefit of his creditors, was operative to pass the title to real estate in Illinois, as against creditors in this State, and it was held that it was not. And it was so held notwithstanding actual possession of the real estate had been taken, under the assignment, before the rights of others had attached.

It was there said: "The doctrine is, that such a conveyance is subject to the claims of resident creditors where the property is located. This we regard as the true rule. It is not just or fair that creditors in this State should be compelled to go to a foreign State to receive a *pro rata* share of the debtor's property, when they perhaps extended credit alone upon the faith of the debtor's property in this State and to which they looked for payment."

The same doctrine is approved in *May v. First Nat. Bank*, 122 Ill. 551; *Woodward v. Brooks*, 128 Ill. 222; *Henderson v. Schaas*, 35 Ill. App. 155; *Webster v. Indah*, 27 Ill. App. 294; *Ford v. Holbrook* (No. 4759, this court, filed May 24, 1893).

If we were to resort to other States we should find the

same principle reiterated in numerous cases, but it is unnecessary.

The case of C., M. & St. P. Ry. Co. v. Keokuk Northern Packet Company, 108 Ill. 317, is clearly distinguishable from this case, and from Heyer v. Alexander, *supra*, upon the grounds stated in the opinion in the latter case, and we only refer to it because it is strenuously urged as being decisive here.

If, then, it be the law that a voluntary assignment by the foreign owner of property has no extra-territorial effect as against creditors resident within the State where the property is located, how much stronger, and with what increased effect, does the rule apply in cases, where, as here, the proceedings were *in invitum*?

"A decree of court appointing an assignee to administer the debtor's property for the benefit of his creditors, whatever its effect in the State where it is rendered, has no extra-territorial effect on the debtor's real estate in another or foreign jurisdiction." Heyer v. Alexander, *supra*.

In principle the rule in cases where the property in controversy is personal property, does not differ from that applied to real estate, when, as here, the receiver claims under an order or decree of a foreign court and not under a voluntary deed by the owner. Woodward v. Brooks, *supra*.

The court below properly held that under the facts disclosed by the record, the doctrine of comity must yield to the superior rights of the resident creditors, and the judgment will therefore be affirmed.

appellants

**Isidor Baumgartl and Siegmund Wilhartz, Copartners,
etc., v. Frank G. Hoyne and James F.
Hoyne, Copartners, etc.**

1. REAL ESTATE BROKERS.—*When Not Entitled to Commissions.*—If a broker is the procuring cause of a sale, he is entitled to compensation, but he must be the procuring cause, and not merely a cause of causes, some of which were neither the necessary or probable result of what he did.

Baumgartl v. Hoyne.

Memorandum.—Assumpsit for commissions. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed June 18, 1894.

STATEMENT OF THE CASE.

Appellants and appellees being engaged in the business of selling real estate on commission, Mr. Wilhartz, of appellants, was, on the 15th day of May, 1890, introduced to Mr. Frank G. Hoyne, of appellees, at their office, 84 La Salle street, Chicago.

Appellees then had for sale a forty-acre tract of land in the city of Chicago, belonging to the estate of Thomas Hoyne, deceased, which the heirs of that estate had placed with appellees for sale on commission. Mr. Hoyne represented to Mr. Wilhartz that if appellants would secure a customer for the land at \$1,500 per acre, appellees would divide their commission with appellants. Appellants thereupon entered the tract of land upon their books, advertised the property for sale and sent Mr. Utitz, a salesman in their employ, to see Mr. Strauss, Mr. Samuels, Mr. Bergenstein and others, with a view to selling them the tract of land.

The Sunday following the interview with Mr. Hoyne, Mr. Utitz, as the agent of appellants, took Mr. Strauss, Mr. Samuels, Mr. Bergenstein and a Mr. Pick out to see the property, these gentlemen contemplating the formation of a syndicate for the purchase of this property, and Mr. Strauss requested Mr. Utitz to ascertain from appellees the lowest price at which the property could be purchased.

About the first of May, Mr. Wilhartz and Mr. Utitz called at the office of appellees and told Mr. Frank G. Hoyne that it would be a hard task to sell the property for \$1,500 an acre, and asked him the lowest price at which it could be offered. Mr. Hoyne, according to the testimony of Mr. Wilhartz, replied that the property might be sold at \$1,250 per acre, and that appellants could have one-half of all above that price at which the property should be sold through their efforts.

Mr. Utitz saw the parties whom he had taken to look at

the property, and according to his testimony they were still endeavoring to form a syndicate for its purchase, although from other evidence it would seem that being unable to raise the money they had practically given it up.

On the 10th of May, 1890, Mr. Strauss spoke to Mr. Rosenberg about the property. Mr. Rosenberg was also in the real estate business at Chicago. He was informed by Mr. Strauss of the efforts that had been made with Mr. Bergenstein, Mr. Pick and others, to form a syndicate for purchasing the property; that they were unable to raise the money, and two weeks previous had "dropped the deal," and Mr. Rosenberg was then asked by Strauss to look at the property with a view to its purchase and sale to a syndicate.

Mr. Rosenberg met and had some talk with Mr. Bergenstein, Mr. Pick, Mr. Witkowsky and a Mr. Miller, and while no definite or binding agreement was made by Mr. Rosenberg with them, yet it was understood that Mr. Rosenberg would look at the property, and if he thought well of it would buy it and dispose of it to a syndicate composed of the gentlemen named, upon terms that might be agreed upon.

Mr. Rosenberg thereupon called upon and saw Mr. Frank G. Hoyne, of appellees, telling him that he, Rosenberg, understood that the forty acres belonging to the Hoyne estate was for sale. Mr. Hoyne said it was, and asked Mr. Rosenberg, who called his attention to it. Mr. Rosenberg replied, a personal friend of his. Mr. Hoyne showed him a card of Mr. Wilhartz and asked whether Mr. Wilhartz had called Mr. Rosenberg's attention to it, and whether Mr. Rosenberg knew Mr. Wilhartz. Mr. Rosenberg replied that he did not know Mr. Wilhartz, and that his attention had not been called to the property by Mr. Wilhartz; that he, Rosenberg, was not acting for anybody save himself; and, finally, made a purchase of the property from Mr. Hoyne for \$56,000, \$15,000 of which was cash and the balance on time.

Mr. Rosenberg disposed of the property to a syndicate composed of Mr. Lazarus, Mr. Samuels, Mr. Witkowsky, Mr.

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Pick, Mr. Strauss, Mr. Donnelly and himself. The syndicate taking the property from Mr. Rosenberg at the price of \$60,000. Mr. Rosenberg kept for himself the entire \$4,000 profit which he made in turning the property over to the syndicate.

It does not appear that appellants or any of their agents, or any one acting at their suggestion or in their behalf, called Mr. Rosenberg's attention to this property, or that he saw or heard of any of the advertisements inserted by appellants. Mr. Strauss, who called Mr. Rosenberg's attention to the property, saw Mr. James Hoyne, of appellees, and asked him if he would allow him, Strauss, a commission if he sold the property. Mr. Hoyne replied that he would, in case he, Mr. Strauss, sold it. Mr. James Hoyne then asked Mr. Strauss from whom he heard about the property, and Mr. Strauss replied that he heard of it through a Mr. Utitz. Mr. James Hoyne then stated that he did not know Mr. Utitz, and had never heard of him.

Appellees received from the Hoyne estate a commission of \$1,400 for selling the property. Appellants having learned by seeing notices of conveyances of the property that it had been sold to a syndicate, some members of which they had not been in negotiation with, brought this action.

At the conclusion of appellant's testimony, upon motion of appellees, the court instructed the jury to find for the defendants.

MOSES, PAM & KENNEDY and JAMES R. WARD, attorneys for appellants.

HOYNE, FOLLANSBEE & O'CONNOR, attorneys for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellants wholly failed to show that they were the procuring cause of the sale to Mr. Rosenberg. Appellees did not sell the property to the syndicate to which Mr. Rosenberg turned the property over. The dealings of appellees in

the matter of the final sale of the property were with Mr. Rosenberg and with nobody else.

Appellants themselves never made any effort to sell to Mr. Rosenberg, and had no communication directly or indirectly with him. The nearest appellants came to having induced Mr. Rosenberg to become the purchaser, is that they did have negotiations with several gentlemen for the purchase of this property, among whom was Mr. Strauss, a cousin of Mr. Rosenberg.

Mr. Strauss, of his own accord, and not by direction or procurement of appellants, spoke to Mr. Rosenberg about purchasing, and about the formation of a syndicate to take the property off from his, Rosenberg's, hands, in case he did purchase. Mr. Rosenberg then went to appellees, and as is indisputably the case, negotiating entirely for himself, and so informing appellees, bought the property of them for \$56,000. That Mr. Rosenberg in so doing was acting, as he himself says, entirely for himself, is manifest from the fact that he did not give to any of the persons who formed the syndicate the benefit of his purchase, and that they did not claim that they were entitled to such benefit, but voluntarily and without objection, paid him \$60,000 for what he, to their knowledge, had purchased for \$56,000.

If, under the circumstances of this case, appellants are entitled to compensation from appellees, because for his own purposes, Mr. Strauss, to whom appellants had spoken, but who was in no way or wise an agent of appellants, called the attention of Mr. Rosenberg to this property and he purchased it, then appellants would be entitled to such commission if Mr. Strauss had spoken to Mr. A, Mr. A to Mr. B, Mr. B to Mr. C, and so on through an hundred of individuals, until in the transmission of intelligence from mouth to mouth and neighborhood to neighborhood, some one who was willing to, and did buy, learned that the property was for sale.

The syndicate to which Mr. Rosenberg sold the property was not made up of the same persons with whom appellants had negotiations, although some of the persons to whom

appellants presented the property, became members of the syndicate that purchased from Mr. Rosenberg.

The only sale made by appellees was to Mr. Rosenberg; it is half of the commissions received by appellees for making such sale, that appellants claim. Mr. Strauss, for his own purposes, called Mr. Rosenberg's attention to the property; Mr. Strauss went to appellees and took care to secure from them a promise of a commission if he, Strauss, sold the property; he in no way acted for appellants.

It is the proximate cause of which the law takes notice, and not the *causa causarum*.

To take notice of a cause of causes were infinite and would lead to endless confusion.

"In jure non remota causa sed proxima spectatur."

Although this maxim is most frequently applied in cases of insurance and in actions of tort, as a principle it may be considered in any case wherein the efficient, promoting cause of a result is to be ascertained.

The proximate cause of an act is that which produces it without the interposition of an independent agency not the probable result of the first cause. *Marble v. City of Worcester*, 4 Gray (Mass.), 395.

In *Scott v. Shephard*, Smith's Leading Cases, 549, 2 Blackstone, 892, the throwing off of the squib by every person upon whom it fell, was a probable result of its being thrown upon a crowd of people.

In the present case it was not probable that Strauss would, for his own purposes, and of his unsought volition, present the property to Rosenberg.

Between all that appellants did and the purchase by Rosenberg, there intervened an entirely independent agency, viz., the determination of Strauss to call the attention of Rosenberg to the property, as well as to get, if he could, a commission for selling it to Rosenberg.

Apparently, after those to whom appellant had spoken had given up the thought of purchasing, and appellant the endeavor to sell to them, Rosenberg was approached by Strauss, and, without any communication with appellants, bought the property for his own use.

It is undoubtedly the rule that if a broker be the procuring cause of a sale, he is entitled to compensation; but he must be the procuring cause, and not merely a cause of causes, some of which were neither the necessary or probable result of what he did.

The judgment of the Circuit Court is affirmed.

John D. Adair v. Ida B. Adair.

1. DECREE—*Evidence to Sustain Must be Found in the Record, etc.*—Where the record contains no evidence tending to support the conclusion of the decree, it must be reversed. The recital of a conclusion is not the finding of a fact.

Memorandum.—Bill for divorce and cross-bill. Error to the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed July 23, 1894.

BRIEF FOR PLAINTIFF IN ERROR, LUTHER LAFLIN MILLS, HOFHEIMER, ZEISLER & MACK, SOLICITORS.

The facts to be found by a decree, or order in chancery, must be "specific facts that were proved on the hearing." Marvin v. Collins, 98 Ill. 510; Moore v. School Trustees, 19 Ill. 82; Walker v. Carey, 53 Ill. 470; Walker v. Abt, 83 Ill. 226; McIntosh v. Saunders, 68 Ill. 128; Baird v. Powers, 131 Ill. 66; Drake v. Cockroft, 4 E. D. Smith, 37; White v. Morrison, 11 Ill. 361; Ward v. Owens, 12 Ill. 283; Osborne v. Horine, 17 Ill. 12.

BRIEF OF DEFENDANT IN ERROR, DUNCAN & GILBERT AND CHARLES W. GRIGGS, ATTORNEYS.

Where the decree states that proofs were heard, and then finds the facts, it will be presumed that the evidence justified the finding, unless the evidence appears in the record, and fails to prove the facts found. Cooley v. Scarlett, 38 Ill. 316; Preston v. Hodgen, 50 Ill. 56; Mauck v. Mauck, 54 Ill. 281.

54	502
60	431
54	502
67	73
67	320

Adair v. Adair.

Since the passage of the act allowing oral testimony in chancery cases, it has been held that the evidence, or the facts proved by it, ought, as before, to appear in the record. The same may be stated in the decree, in a bill of exceptions, in a certificate of the judge, or in master's report. *McIntosh v. Saunders*, 68 Ill. 128; *White v. Morrison et al.*, 11 Ill. 361; *Ward v. Owens et al.*, 12 Ill. 283; *Smith v. Newland*, 40 Ill. 101.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

On bill by the defendant in error and cross-bill by the plaintiff in error, both for divorce, the Circuit Court, on the 14th of July, 1893, entered this order or decree:

"This day come the parties by their respective solicitors, and thereupon the complainant moves the court for an order requiring the defendant to pay her alimony during the pendency of this suit, and the court having heard the evidence and arguments of counsel, and being now fully advised in the premises, the court finds that it is equitable and just that the defendant should pay the complainant the sum of fifteen dollars (\$15) per week as alimony during the pendency of this suit, commencing from the first day of June, 1893, for the support of herself and the child of the complainant and defendant.

It is therefore ordered, adjudged and decreed by the court that the defendant pay to the complainant or to her solicitors, on the 20th day of July, A. D. 1893, the sum of one hundred and twenty dollars (\$120), and on the Thursday of each and every week thereafter the sum of fifteen dollars (\$15), as alimony, during the pendency of this suit, until the further order of this court."

The record contains no evidence tending to support the conclusion that it was "equitable and just that the defendant should pay the complainant the sum of fifteen dollars (\$15) per week as alimony," nor is the recital of that conclusion a finding of any fact.

In substance it is like the recital in *Baird v. Powers*, 131 Ill. 66, "that the complainant is entitled to the relief," etc. The decree is reversed and the cause remanded.

**Alexander Orr Bradley v. Lisetta Sattler, formerly
Lisetta Casparini, Administratrix.**

1. **NEGLIGENCE—Unprotected Machinery.**—A shaft in a factory revolving 300 times a minute with no protection about it; a barrel containing pumice, standing about two feet from it; access to the barrel partially obstructed by a box, standing by it on the side opposite to the shaft. It was the duty of a boy to take pumice from the barrel and put it into another box; in so doing he went between the barrel and the shaft; his overalls were caught by a pin on it; he was whirled around the shaft and killed. *Held*, the proprietor of the factory was guilty of negligence.

2. **NEXT OF KIN—Death from Negligent Act.**—Under the act requiring compensation for causing death by wrongful act, neglect or default, the widowed mother has the same rights the father would have had, if living.

Memorandum.—Action for damages. Death from negligent act. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed June 4, 1894.

WOLSELEY & HEATH, attorneys for appellant; JOHN N. JEWETT, of counsel.

BRANDT & HOFFMANN and J. S. KENNARD, JR., attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

A boy twelve years and three months old, employed in a factory in which there was a shaft along side of a wall, fifteen to eighteen inches from it, and the same distance from the floor. Projecting from the side of the shaft, half an inch to an inch, what the witnesses call a pin, but machinists would probably call a feather, key or spline, to a coupling of the shaft. The shaft revolving 300 times a minute, with no protection about it.

A barrel containing ground pumice standing about two feet from the shaft; access to the barrel partially obstructed by a box, higher than the barrel, standing by it on the side oppo-

54	504
54	277
54	504
156	603
54	504
63	437
54	504
68	561
54	504
95	514
54	504
105	652
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108	855
54	504
114	850

site to the shaft, as well as by the work of other employes. The duty of the boy to take pumice from the barrel, putting it into a box which, for that purpose, he placed upon the box first mentioned. In so doing he went between the barrel and the shaft; his overalls were caught by the pin, and he was whirled around the shaft and killed. Such are the facts that the evidence tended to prove, and warranted the jury to believe, and on such facts no arguments of counsel, nor instructions by the court, can prevent a verdict in favor of the administratrix of the boy, and against the proprietor of the factory, whatever may be proved about the boy being told to keep away from the machinery—to be careful—not to wear an apron, that he would get killed.

The appellee was permitted to put in, over the exceptions of the appellant, the opinion of a witness that the shaft could have been boxed, which was wrong, but the fact was so obvious that it would be trifling to hold the admission of the opinion to be error. *Chicago & Great Western R. R. v. Wedel*, 44 Ill. App. 215; S. C., 144 Ill. 9.

The witness volunteered the further statement that it was afterward boxed, but that was at once stricken out as not responsive. Very nearly the same course was pursued in the testimony as to room for the barrel away from the shaft.

All of the complaints of the appellant as to the instructions are without any recognition of the difference between adults and children. See *Hinckley v. Horazdowsky*, 133 Ill. 359.

This is a better case for the appellee than was *Ames & Frost Co. v. Strachupski*, 145 Ill. 192, where the Supreme Court was obliged to consider the sufficiency of the evidence, and affirmed the judgment.

The damages were assessed at the maximum allowed by statute.

The appellant urges that as the father of the boy was dead, there was no one entitled to his services; that the mother, who is the administratrix, did not succeed to the right which the father had, and that therefore no substantial damages can be awarded without proof of actual dam-

ages; citing *City of Chicago v. Schotlen*, 75 Ill. 471, and other cases for the principles to be applied. This court is committed to the doctrine that the widowed mother has the same rights the father would have had if living. *Andrews v. Boedecker*, 17 Ill. App. 213.

It may be said that this court is also committed to the practice that it will review the action of the jury, and determine whether the damages awarded were excessive. But the amount of damages sustained in any particular case is a question of fact in that case, to be determined by the evidence in that case, or, where the matter is of a kind that the amount of loss is not susceptible of proof, as loss of limb, health, reputation, or, as here, the wholly conjectural pecuniary benefit of the continuance of the life of another, by what is euphoniously called the discretion and sound judgment of a jury.

The decision upon such question of fact in one case, is no guide to the decision of a similar question in another case. Even on a second appeal in the same case, where the court by numerous authorities in this State is bound to the law that it laid down on the first appeal, yet it is not bound to the same conclusion upon the facts, even if the evidence remains the same. *C., B. & Q. R. R. Co. v. Lee*, 87 Ill. 454.

In cases where the law allows the recovery of damages of a kind that no proof of the amount is possible, the verdicts can not be based upon any system, and harmony among them is impossible, and where the policy of the law is to trust juries rather than courts, by taking away from the court the power to talk to the jury before the verdict—summing up the evidence and pointing out its tendency—commenting upon the arguments of opposing counsel—exposing sophistries—and generally endeavoring to aid a jury really desirous to give a fair and honest verdict, it is a more delicate matter for the court to disturb the verdict than it is under a system which recognizes the court as the head of the tribunal where the law is to be administered.

What may be in fact the damages here can only be conjectured—in homelier English, guessed at.

Under such circumstances the verdict of the jury, unless

Harvey v. Hamilton.

the court can say that it was dictated by passion or prejudice, and was not rendered in the exercise of their “discretion and sound judgment,” should be final. We can not improve upon, and need not repeat, the argument of Westbrook J., in Hooghkirk v. President, etc., Del. v. Hud., 63 How. Pr. Rep. 328.

The judgment must be affirmed.

WATERMAN, J. I think that the damages awarded are excessive.

Ira R. Harvey v. Wm. R. Hamilton.

1. **CONTRACTS**—*Courts Enforce but do not Make.*—Courts can not make contracts for parties, but can construe and enforce them.

2. **INTEREST**—*As Damages.*—A recovery of interest in this State can not be sustained unless authorized by our statutes.

3. **SAME**—*On Unliquidated Damages.*—Our statute relating to interest does not authorize the recovery of interest on unliquidated damages for a failure to turn out property.

4. **SAME**—*On Damages Not Ascertainable by Computation.*—Where a contract to convey land is so indefinite in its description as to render it incapable of specific performance, and its value in money unknown, and there is no way in which the vendor can, before verdict, know even approximately how much he is liable for, the rule of permitting interest upon damages ascertainable by computation, or from well established market prices, can not be applied.

5. **INSTRUCTIONS**—*Submitting Questions of Law.*—An instruction which states “If the jury believe from all the evidence given in the case that the plaintiff is entitled to recover against the defendant, then,” etc., is erroneous, as it submits a question of law.

Memorandum.—Assumpsit for breach of contract. Appeal from the Circuit Court of Cook County; the Hon. SAMUEL P. McCONNELL, Judge, presiding. Heard in this court at the March term, 1894. Reversed, unless excess of legal damages are remitted, etc. Opinion filed May 28, 1894.

The opinion states the case.

APPELLANT’S BRIEF, JAMES FRAKE AND B. W. ELLIS,
ATTORNEYS.

The recovery of interest in this State depends entirely upon statute, and unless authorized by the statute can not be

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155 377

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194 86

54 507
104 517

recovered. *I. C. R. R. v. Cobb*, 72 Ill. 148; *Sammis v. Clark*, 13 Ill. 544; *Hill v. Allen*, 13 Ill. 596; *Aldrich v. Dunham*, 16 Ill. 403; *Stern v. The People*, 9 Brad. 412. Interest is the creature of the statute. *City of Chicago v. Allcock*, 36 Ill. 384.

Our statute allows interest for all moneys after due on any bond, bill, promissory note or other instrument in writing, and on money lent or advanced for the use of another on balance of liquidated accounts and on money received for another's use and retained without his knowledge. Ch. 74, Sec. 2, R. S. Ill.; *Buckmaster v. Grundy*, 8 Ill. 633.

"No interest can be allowed upon a recovery for a breach of an executory contract under our statute. The allowance of interest in this suit can not be sustained under the last clause of the section which gives interest on money withheld by an unreasonable and vexatious delay of payments. For under that clause the question of 'delay and vexation' is one of fact for the jury, and by no possible construction was any money due upon the contract between the parties, and so there could be no vexatious delay in payment." *Kelderhouse v. Lainous*, 1 Brad. 69; *I. C. R. R. Co. v. Cobb*, *Blaisdell & Co.*, 72 Ill. 152; *Perley on the Law of Interest*, 21.

APPELLEE'S BRIEF, PECK, MILLER & STARR, ATTORNEYS.

Breach of covenant to convey land. The measure of damages is the value of the land at the time the conveyance should have been made, with interest thereon. *Gale v. Deane*, 20 Ill. 320; *Major v. Dunnavant*, 25 Ill. 262; 1 *Sutherland on Damages*, Sec. 105; *Cock v. Taylor*, 3 *Overten* (Tenn.), 49; *S. C.*, 5 Am. Dec. 650; *Talbott v. Bedford's Heirs*, 1 *Cooke* (Tenn.), 447; *Perkins v. Hadley*, 46 *Haywood* (Tenn.), 143; *Morris v. Phelps*, 5 *Johnson* (N. Y.), 49; *Casswell v. Wendell*, 4 *Mass.* 108; *Cornell v. Jackson*, 3 *Cush.* 306.

"The value of property constitutes the measure or an element of damages in the great variety of cases, both of tort and of contract; and where there are no such aggravations as call for or justify exemplary damages in actions in which such damages are recoverable, the value is ascertained and

adopted as the measure of compensation for being deprived of the property, the same in actions of tort as in those upon contract. In both cases the value is the legal and fixed measure of damages, and there is no discretion with the jury. It is so between vendor and vendee on the failure of either to fulfill a contract of sale and purchase; between employer and employe, on a contract for the manufacture of specific articles, where there is a departure from instructions by an agent, or a loss through his negligence or misconduct, or that of a bailee or trustee, as well as where there is a tortious taking or conversion by one standing in no direct relation to the owner; and, moreover, the value is fixed in each instance on similar considerations at the time when, by the defendant's fault, the loss culminates.

The party who is entitled to recover and must accept its value in place of the property itself, should always be allowed interest on the value from the date at which the property was lost, or destroyed, or converted; whether he recovers the value for the failure of a vendor or bailee to deliver, or by reason of the destruction, asportation, or conversion of the property by a wrong-doer, interest is as necessary to the complete indemnity as the value itself. The injured party ought to be put in the same condition, as far as money can do it, in which he would have been if the contract had been fulfilled, or the tort had not been committed, or the loss had been instantly repaired when compensation was due." 1 Sutherland on Damages, 2d Ed., Sec. 105.

There is a small class of cases in which the larger measure of damages is laid down, viz., the value at the time of the verdict, if that be larger than the former value with interest. This class is the one in which the defendant is able to convey, and willfully refuses to convey, without cause, desiring himself to speculate on the advance of the property being greater than the former value and interest, or where the defendant fraudulently makes a contract of sale of property, of which he had no title and knew he had none, but deceived the plaintiff into supposing that he was dealing with the real owner. In such cases the courts hold that he can not

profit by his own wrong. Baldwin v. Munn, 2 Wend. 399; Wilson v. Robertson, 1 Brunner, U. S. C. C. 109; 1 Overton, 464; Sween v. Steele, 5 Iowa, 352; 10 Iowa, 374; Foley v. McKeegan, 4 Iowa, 1; Stewart v. Noble, 1 Green, Iowa, 26; Baltimore P. B. & L. Soc. v. Smith, 54 Md. 187; Sandford v. Cloud, 17 Fla. 532; Johnson v. Hamilton, 36 Texas, 270; Thompson v. Guthrie, 9 Leigh, 101; McKinnon v. Burrows, 3 Up. Can. Q. B. (O. S.) 590; Hopkins v. Lee, 66 Wheat. 118; Williams v. Glenten, L. R., 1 Chancery App. 200; Engel v. Fitch, L. R., 3 Q. B. 314, 4 Ibid. 659; Allen v. Anderson, 2 Bibb (Ky.) 415; McConnell v. Dunlap, Hardin (Ky.) 41; Patrick v. Marshall, 2 Bibb (Ky.) 46; Fisher v. Kay, 2 Bibb (Ky.) 434; Margraf v. Muir, 57 N. Y. 155.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

Suit was brought by the appellee, Hamilton, against the appellant, Harvey, for damages for the breach of the following contract:

“CHICAGO, ILLS., November 17, 1885.

MR. W. R. HAMILTON.

Dear Sir: I hereby agree to lease my building at Pacific Junction, known as the Rotary Plow Factory Co., at \$100 per month for the first year, or the privilege hereafter of buying, if they choose, at \$10,000, or if building should not be suitable, will donate 200 feet square feet along railroad for company to build on. Will allow you as commission for said location, one-third interest in five acres located near said works.

I. R. HARVEY.”

Acting under the agreement above quoted, Hamilton, with the approval of Harvey, procured certain persons, doing business under the style of the Maxwell Patent White Lead Company, to take a lease of the factory by a lease dated December 18, 1885, for a term of two years, from January 1, 1886, to December 31, 1887, at a rental of \$1,000 for the first year, and \$1,200 for the second year, with the privilege of a renewal of the lease for an additional term of three years.

Harvey v. Hamilton.

The Maxwell Company entered into possession under the lease, on January 1, 1886, and remained and carried on a manufacturing business there for five years, with indifferent success, and then removed.

Having, in the manner indicated, secured a tenant who was accepted as such by the appellant, the appellee demanded a conveyance to him of the one-third of five acres of land promised as a commission for so doing. A conveyance being refused, this suit for damages was begun, and from a judgment entered upon a verdict for \$4,899, in favor of appellee, this appeal is prosecuted.

The appellant contends that the "location" for which the commission was agreed to be paid, referred not to the renting of the factory, but to a permanent location at the place indicated, either by the purchase of the factory that was leased, or by building upon the land offered to be donated for that purpose.

We do not concur in that contention. It appears from the evidence that the parties had in mind when the proposition was made, the securing of the Maxwell Company as a tenant and optional purchaser.

The appellant was the owner of a considerable amount of unoccupied land in the suburb to Chicago known as Pacific Junction, as well as being the owner, in equity at least, of the vacant building called the plow factory. That he was disappointed in the results he hoped would follow, in the way of selling lots out of his property, from the location of the Maxwell Company's manufacturing business at that point, furnishes no legal excuse for not complying with his contract with the appellee. It was simply his misfortune if no beneficial results flowed from the location of that business there. Courts can not make contracts for parties, but may only construe and enforce them.

The proposition relates to the accomplishment of either one of the three results, viz.: a lease of the plow factory building, a privilege to buy it, or arrangements whereby a new building should be erected upon land to be donated.

The whole instrument construed together, we think, most clearly requires the word "location," as therein used, to

apply to either one of the results which the parties contemplated producing, and that a "location" was secured when an accepted lessee of the factory was procured for Harvey by Hamilton.

Such being the case, both law and justice concur in requiring Harvey to pay Hamilton whatever damages resulted to the latter from the refusal of the former to abide by his contract; and had no error of law been committed on the trial of the cause the judgment would be affirmed.

It is apparent that a very considerable proportion of the amount of the judgment is made up by the allowance of interest on the value of the property refused to be conveyed to Hamilton, from the alleged date of the breach of contract to convey.

The court instructed the jury that "the jury should ascertain the amount of such damages at the time of the breach of contract, and add thereto the interest upon such amount from the time of such breach of contract down to the date of the verdict."

A recovery of interest in this State can not be sustained unless authorized by our statutes. If not authorized by the statute it can not be recovered. *R. R. Co. v. Cobb*, 72 Ill. 148; *Cooper v. Johnson*, 27 Ill. App. 504.

It is unnecessary to quote the statute relating to interest, but is sufficient to say that it does not authorize the recovery of interest on liquidated damages for a failure to turn out property.

The demand here is neither for money due or to become due on any instrument in writing; for money lent or advanced or due on account stated, or had and received and retained, or withheld vexatiously.

Under the authorities it is sometimes a matter of much difficulty to determine when the damages are unliquidated to the extent of forbidding a recovery of interest.

But it is safe to say that in Illinois interest is not allowable on unliquidated demands, in any case, where the amount of damages is not ascertainable by simple computation, or by reference to generally recognized standards such as market prices.

Harvey v. Hamilton.

Such a rule was commented upon by the New York Court of Appeals, in the case of *McMahon v. N. Y. & E. R. R. Co.*, 20 N. Y. 463, where it was said :

“ The old common law rule which required that a demand should be liquidated, or its amount in some way ascertained, before interest could be allowed, has been modified by general consent, so far as to hold that if the amount is capable of being ascertained by mere computation, then it shall carry interest, and this court, in the case of *Van Rensselaer v. Jewett*, went a step further and allowed interest upon an unliquidated demand, the amount of which could be ascertained by computation, together with a reference to well-established market values; because such values in many cases are so nearly certain, that it would be possible for the debtor to obtain some proximate knowledge of how much he was to pay. That case went, I think, so far as it is reasonable and proper to go in that direction. So long as the courts adhere even to the principles of that case, they are not without a rule which it is possible to apply. The rule itself is definite, and the only uncertainty which it introduces is that, which necessarily attends the settling of market rates and prices.”

Cases where interest has been allowed in actions of trover and upon breaches of covenants of warranty and for breaches of contracts to convey land where the consideration has been paid, are inapplicable to the facts of this case.

Here there was an agreement to convey an undivided one-third interest in some land so indefinite in description as to render the contract incapable of specific performance. *Hamilton v. Harvey*, 121 Ill. 469.

There was no specific property to which the appellee could lay claim, and hence its value in money was not known, and there was no way in which the appellant could, before verdict, know even approximately how much he was liable for to the appellee.

That the rule heretofore adverted to of permitting interest upon damages ascertainable by computation, or from well established market prices, can not be applied in this case, is

made very plain from the testimony of witnesses on the trial, who ranged in opinion from \$150 per lot previous to the time the lease to the Maxwell Company was made, to \$400 per lot, "when the location was decided upon," which was before the alleged breach occurred, and the value per lot found by the jury at "\$213 per lot," as stated in the brief for appellee.

With such a range in estimated values it surely may not be said that there was at the time of the breach a well established market price, from which, without the verdict of a jury, the appellant could know how much he would have to pay, or was liable for.

The fourth instruction was likewise erroneous for the same reason, and for the further reason that it submitted to the jury a question of law, as follows: "And if they further believe from all the evidence given in the case, that the plaintiff is entitled to recover against the defendant, then," etc.

But, inasmuch as the appellant could not have been prejudiced thereby, for the reason that it added something more to be found against him before a verdict unfavorable to him could have been given by the jury, we are not inclined to place much stress upon it.

With, therefore, the instruction regarding the allowance of interest constituting such a substantial error as in our opinion demands a reversal of the judgment and a remanding of the cause, it will be so ordered, unless the appellee shall within ten days remit in this court, from the judgment, down to the sum of \$2,505.20; and if such a remittitur be entered, we will affirm the judgment for that amount.

We are prompted to this course in order that the parties may come to an end of their litigation, which has now, in one form or another, been pending for more than seven years over this contract, and because we believe that thereby substantial justice will be done.

The amount of \$2,505.20 is arrived at by us in adopting the figures shown on page 7 of appellant's brief, as constituting the average of the valuations placed upon the property by the parties themselves.

Racine Wagon & Carriage Co. v. Roberts.

**Racine Wagon and Carriage Company v. D. M. Roberts
and Ella F. Jones.**

1. **HUSBAND AND WIFE—*Gifts.***—In this State, subject to the rights of his creditors, a husband may give to his wife all the property he has.

2. **SAME—*Conveyances—Who Can Not Question.***—A creditor whose debt is not contracted until after a conveyance by a husband to his wife, can not question the validity of the same.

3. **ESTOPPEL—*Binds Privies.***—Where a person is estopped by his deed from claiming that property is his, a party who claims under him is bound by the same estoppel.

Memorandum.—Creditor's bill. • Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 30, 1894.

The opinion states the case.

JAMES R. DOOLITTLE and SAMUEL B. KING, attorneys for appellant.

J. W. MERRIAM, attorney for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was a creditor's bill based upon a judgment against D. M. Roberts. An endeavor was made to subject certain real property, the title to which stands of record in Ella Jones, to the payment of the judgment. The property seems to have been purchased by Louie Roberts when she was the wife of D. M. Roberts, and she afterward conveyed the same to Ella Jones, her step-daughter, in payment of notes amounting to about \$2,000, made by Louie Roberts and held by Ella Jones. When D. M. Roberts married Louie Roberts, she had \$10,000 in money. They were married in New Hampshire. Mrs. Roberts seems to have always managed her own property, and to have put a good deal of money into business in which her husband was engaged.

It is insisted that at the common law a wife's personal property, in possession, passed and became the property of the husband, and that it must be presumed that the common

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law existed in New Hampshire, consequently that the \$10,000 in money possessed by her when she was married, became his property.

Granting that this is the case, D. M. Roberts, when he came to Illinois, could, subject to the rights of his creditors, give to her all that he had. The property in question, if purchased or improved with his money, was conveyed to her, and, under the evidence in this case, must, if acquired with his means, be presumed to have been a gift by him to her. He may have been then insolvent, but neither any of his then creditors, nor any person induced to give him credit by reason of his apparent or supposed ownership of this property or the money paid therefor, is seeking to set aside the gift, if such it was. Appellant's debt was not contracted until several years after the conveyance to Ella Jones was made.

The complainant in this case is, therefore, not entitled to impeach the conveyance to Ella Jones. *Moritz v. Hoffman*, 35 Ill. 553; *Merrill v. Lutz*, 34 Ill. 382; *Wooldridge v. Gage*, 68 Ill. 159.

Ella Jones gave a valuable consideration for this property.

It is not shown that she knew it was a trust estate. She had, so far as appears, no reason to suppose that D. M. Roberts and her mother had not a perfect right to convey it to her. It is claimed that it was then held by Louie Roberts, in trust for D. M. Roberts; but D. M. Roberts joined in the conveyance to Ella Jones; she took title from both the trustee and him for whom the trust was, if any trust there was. D. M. Roberts is estopped by his deed from claiming that the property is his, and the complainant, who claims under him, is bound by the same estoppel. *Maxwell v. Maxwell*, 109 Ill. 588-591; *Smith v. Smith*, 144 Ill. 299-307; *Bowman v. Ash*, 143 Ill. 649-665; *Sweeney v. Damron*, 47 Ill. 450-457; *Bridgeford v. Riddell*, 55 Ill. 261, 263, 267; *Perry on Trusts*, Sec. 147.

There is no evidence that the conveyance to Ella Jones was made to hinder, delay or defraud creditors.

The decree of the Superior Court is affirmed.

Juillard v. Walker.

54	517
60	487
158s	417

54	517
105	1636

A. D. Juillard et al. v. James H. Walker et al., L. A.
 Carton v. James H. Walker et al., Thomas
 H. Smith, Trustee, v. Chicago Title
 and Trust Company, Receiver
 of James H. Walker Co.

1. **INSOLVENT CORPORATIONS—*Preferences Not Void.***—Although a corporation, insolvent, and in concert with its creditors, determines upon winding up its affairs through a receiver, no preference to creditors is void or voidable, because of such conditions.

2. **ASSIGNMENTS—*By the Treasurer of Insolvent Corporation.***—The treasurer of a corporation has, by virtue of his office, no power to assign the accounts of the corporation, but when the board of directors have attempted to authorize him to do so, if, looking at all the circumstances, the conclusion is irresistible that the board of directors intended to confer such power upon him, and if the language used may be, it should be, read as they intended.

3. **SAME—*Acceptance Presumed.***—Where the accounts of an insolvent corporation have been assigned for the benefit of creditors, the approval of the assignment by the depositors, is immaterial. The assignment is for their benefit, and their assent will be presumed unless the contrary appears.

4. **RECEIVERS—*Do Not Succeed to the Volition of the Insolvent.***—While a receiver comes in subject to all burdens, it has never been contended that he succeeds to the exercise of the volition of any party.

Memorandum.—Petition to have assignment declared void. Appeal from the Circuit Court of Cook County; the Hon. SAMUEL P. McCONNELL, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed May 28, 1894.

The opinion states the case.

HAMLIN, SCOTT & LORD, attorneys for appellant.

WILLIAM C. NIBLACK, attorney for the receiver.

SWIFT, CAMPBELL, JONES & MARTIN, attorneys for L. A. Carton.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT. James H. Walker Co. was a corporation engaged in the "dry goods business." It was insolvent, and owed many of

its employes and customers for money left with the corporation on deposit. There was a great deal of talk for three or four days among the persons conducting the business of the corporation about securing these depositors.

August 3, 1893, a meeting of the board of depositors was held, at which was adopted a resolution as follows:

“Whereas, efforts are being made in New York and elsewhere, to raise money to help this company out of its existing difficulties; and

Whereas, certain of the creditors are becoming importunate and pressing in their demands for payment.

Now, therefore, be it resolved, that pending the arrival of the expected assistance from New York, the treasurer of the company be, and he is hereby authorized to indorse over and assign any drafts, bills and accounts receivable of the company which may be in his hands, in payment of or security for any claim against or debts of this company; and he is also hereby authorized to assign and transfer any accounts due the company, in the same manner to such creditors, or to such other persons as they may designate, for their protection.”

From all the evidence it is clear that the only “creditors” thought of in passing that resolution were the depositors, and it is also clear that it was perfectly well known to all parties, that the treasurer, neither by his office, nor as an individual, had “in his hands” or personal custody “any drafts, bills or accounts receivable of the company.”

The meeting of the creditors began at 3:30 P. M., and the same evening the treasurer told the appellant—who was an employe—to make out a list of the deposits and select enough accounts to secure them. The next morning two lists of accounts were prepared, under each of which was written: “For value received we hereby assign, transfer and set over all our rights, title and interest in the above accounts to T. H. Smith, trustee.

JAMES H. WALKER Co.,
By W. A. MASON, Treas.

CHICAGO, August 4, 1893.

Juillard v. Walker.

I hereby accept the within accounts as trustee for the following named parties.

T. H. SMITH.

CHICAGO, August 4, 1893."

And following the name of Smith was a list of depositors not employes, on one list, and of depositors employes, on the other.

The amount of each account, and of each deposit, was carried out on the lists.

Without going into detail it suffices to say that immediately the debtors on the assigned accounts were notified, and on the ledger of the corporation was entered on each account "assigned to Thomas H. Smith, trustee."

Later the same day, under a creditor's bill against the corporation and others, the appellee was appointed receiver, and the money paid on the assigned accounts is in its hands, but kept separately, awaiting distribution by the court.

The appellant filed a petition that it be paid over to him, which petition the Circuit Court denied, and this appeal is prosecuted to reverse that decision.

Although the corporation was insolvent, and in concert with creditors, had determined upon winding up through a receiver, no preference to creditors is void or voidable because of such condition. *Gottlieb v. Miller*, 47 Ill. App. 588; *Peterson v. Brabrook Tailoring Co.*, Chicago Legal News, May 12, 1894.

That the treasurer had, by virtue of his office, simply no power to assign the accounts may be conceded, but looking at all the circumstances, the conclusion is irresistible that the board of directors intended to confer the power, and if the language used may be, it should be, read as they intended. The words "in his hands" were used, not to express any definite idea, but as a mere euphuism, rounding out the phraseology of the resolution.

That the evidence fails expressly to show knowledge and approval of the assignments by the depositors, is immaterial. They were for their benefit, and their assent will be presumed unless the contrary appears. *Burrill, Assignments*, 409.

What power of revocation might remain with the corporation in the absence of all evidence of their assent, it is unnecessary to consider, as no revocation has been attempted,

While a receiver comes in subject to all burdens, it has never been contended that he succeeds to the exercise of the volition of any party. The assignments having been made for a valuable consideration, to satisfy meritorious demands, having in common understanding, peculiar claim to favor, there is no impediment in the law which prevents the intention of the corporation being executed.

The decree dismissing the petition of the appellant is reversed and the cause remanded with directions to the Circuit Court to grant the prayer of that petition.

We have refrained from considering whether the doctrine of *Farwell v. Cohen*, 138 Ill. 216, can be made to cut any figure here.

54	520
55	396
54	520
61	392
54	520
67	295
54	520
82	435

Morris Einstein and Joseph Guckenheimer v. Henry Lewis, Walter H. Lewis and James F. White.

1. **ASSIGNMENTS—General and Particular.**—An assignment which is not by its terms general, but partial, operates only upon the property expressly assigned. It draws nothing to it and there can be no unlawful preferences as to assets not assigned by it.

Memorandum.—Appeal from an order of the Circuit Court of Cook County, appointing a receiver; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed July 5, 1894.

The opinion states the case.

DUPEE, JUDAH & WILLARD, attorneys for appellants.

MOSES, PAM & KENNEDY, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court of Cook County, appointing a receiver under a bill filed by

Einstein v. Lewis.

the appellees, who are simple contract creditors of the firm of Einstein & Co., a firm composed of two sons of Morris Einstein and two other persons.

Being but simple contract creditors of the firm of Einstein & Co., the complainants can not attack the good faith of any of the transactions hereinafter narrated. *Durand v. Gray*, 129 Ill. 9.

Nor indeed do they claim that they may make such attack; what they claim is, that those transactions should be held to be, or to have the effect of, an assignment under the statute, for the benefit of creditors.

The case, in short, is that the firm of Einstein & Co. was insolvent, though with large assets consisting of merchandise, cash and accounts against customers. They owed upon notes, not yet due, upon which Morris Einstein was liable as guarantor or indorser, about \$90,000. More than one-half of those notes Morris Einstein obtained from the holders of them, by substituting his own individual notes for them.

Guckenheimer was the agent of the holder of the other notes of the firm of Einstein & Co. and for the amount of them, to him the firm made a judgment note, which Morris Einstein guaranteed or indorsed. To Morris Einstein the firm also made a judgment note for the amount of the notes which he had taken up as before mentioned. Upon this was applied as a credit the cash the firm had. Judgments were entered upon both the judgment notes, and upon the judgments executions were issued and levied upon the merchandise; and all the accounts and bills receivable of the firm were assigned by the firm to Morris Einstein, and then by the firm again assigned to Guckenheimer, subject to the assignment to Morris Einstein.

Now, the argument is that Guckenheimer, having no interest in the judgment note and assignment to him, is necessarily a trustee for the creditors he represents; that therefore within the doctrine of *Farwell v. Cohen*, 138 Ill. 216, the assignment to him is an assignment under the statute for the benefit of creditors; and then that under the

doctrine of *Preston v. Spaulding*, 120 Ill. 208, both of the assignments and the judgment notes, being parts of one transaction in which the firm of Einstein & Co., Morris Einstein, and Guckenheimer participated, the object being to prefer the favored creditors, the law regards all the property of the insolvent firm as embraced within the assignment to Guckenheimer, and will make a distribution of the proceeds of all the assets of the firm of Einstein & Co. *pro rata*, among all the creditors of that firm.

But the assignment to Guckenheimer is not by its terms a general, but only a partial assignment, and such an assignment, if we follow *Farwell v. Cohen*, 138 Ill. 216, draws nothing to it. It operates only upon the property expressly assigned. It follows that in a case of partial assignment, there can be no unlawful preferences as to assets not assigned. Here the subject of the assignment to Guckenheimer was whatever might be left of the accounts and bills recoverable after Morris Einstein was paid.

If, as is not probable, Guckenheimer has got, or has the right as against Morris Einstein to take into his own hands, anything under the assignment to him—Guckenheimer—the question of whether a receiver might be appointed over that anything, does not arise on this record. But there is no case justifying the appointment of a receiver generally, of the assets of the firm of Einstein & Co., and the order appealed from is reversed and the case remanded, with directions to the Circuit Court to restore the assets in the receiver's hands to the custody from which they were taken, and order that all the costs and expenses attending the appointment and continuance in office of the receiver be paid by the appellees, who will also pay the costs in this court.

Rand, McNally & Company v. Daniel W. Pomeroy.

1. GARNISHMENT—*Justice's Jurisdiction*.—In garnishee proceedings before a justice of the peace, where the answer of the garnishee discloses an indebtedness greater than the justice's jurisdiction, the proceedings must be dismissed.

Trainor v. Adams.

Memorandum.—Garnishee proceedings. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1894, and reversed. Opinion filed June 4, 1894.

The opinion states the case.

PEASE & McEWEN, attorneys for appellant.

WALTER W. ROSS, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee sued the Kalamazoo Paper Co., before a justice of the peace, and caused the appellant to be summoned as garnishee.

The appellant answered that it owed the paper company \$1,056.51; the justice gave judgment against the appellant on that answer for \$36.10, and on appeal by the appellant, the Circuit Court did likewise.

Omitting all reference to other questions made, the judgment must be reversed, as it is the doctrine of this court that a justice has no jurisdiction of a garnishee owing more than \$200.

There is no hardship. The creditor may go at first into a court of unlimited jurisdiction. *Haines v. O'Connor*, 5 Ill. App. 213; *Merchant v. Howland*, 46 Ill. App. 458; *Hughes v. Fort Dearborn Nat'l Bank*, 47 Ill. App. 567.

The justice having no jurisdiction, the Circuit Court on appeal should have dismissed the suit. Sec. 73, Ch. 79, Justices Act, R. S.; *Stolberg v. Ohnmacht*, 50 Ill. 442.

The judgment is reversed, but as there can be no further proceedings the case is not remanded.

John C. Trainor v. Julian Adams.

1. **PROMISSORY NOTES—Innocent Holders.**—T. signed a printed blank of a promissory note, and intrusted it to one Ca. to buy a horse of Co. for \$51. Co. wouldn't take T's signature on the note, and so Ca. bought the horse for \$51, and one An. bought another for \$60, and the price of

the two horses, \$111, was put into the note, which Ca. and An. also signed, and delivered it, thus signed by the three, to Co., who assigned it to Ad. The note was held good in the hands of the assignee.

Memorandum.—Assumpsit. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed March 26, 1894.

The opinion states the case.

APPELLANT'S BRIEF, CHAS. J. TRAINOR, ATTORNEY.

Appellant asks that the judgment be set aside and suit dismissed as to him, because the evidence shows that appellee purchased, or in some way came into possession of the note after maturity, and hence he acquires but the actual right and title of the transferrer, and takes it subject to all the equities with which it is incumbered in the hands of the party from whom he received it. For it comes "disgraced to him" and with full knowledge that something is wrong about the note. It is dishonored by not being taken up at its maturity. It comes to him tainted with suspicion, and he is put upon inquiry as to the rights of the former holder, and the real and not the apparent liability of the makers. He takes it precisely as it was held by him from whom he acquires his title. The maxim *caveat emptor* applies in such a case. And hence he takes it subject to any defense that could be made to it, had the suit been brought in the name of the original payee. *Bissell v. Curran*, 69 Ill. 20; *Cooper et al. v. Nock*, 27 Ill. 301; *Stafford v. Fargo*, 35 Ill. 481; *Lock v. Fulford*, 52 Ill. 166; *Lord et al. v. Favorite*, 29 Ill. 149; *Thompson v. Shoemaker*, 68 Ill. 256; *Bradley v. Linn*, 19 Brad. 322.

APPELLEE'S BRIEF, HIRAM HOLBROOK ROSE, ATTORNEY.

The mere possession of a negotiable instrument, produced in evidence by the indorsee, or by the assignee where no indorsement is necessary, imports, *prima facie*, that he acquired it *bona fide* for full value, in the usual course of business, before maturity, and without notice of any circum-

Trainor v. Adams.

stances impeaching its validity; and that he is the owner thereof, entitled to recover the full amount against all prior parties. In other words, the production of the instrument and proof that it is genuine, *prima facie* establishes his case, and he may rest it. Daniel's Negotiable Inst., Sec. 812 (3d Ed.); Palmer v. Nassau Bank, 78 Ill. 381; McHenry v. Ridgely, 2 Scam. 309; Curtiss v. Martin, 20 Ill. 557.

The burden of proof was on the defendant to show by a preponderance of evidence that the above state of facts did not exist.

It is the settled doctrine that if a party signs his name to a blank paper and delivers it with authority to fill the blank above his signature, with a note or bill for a particular amount or to a specified person, and the person receiving it fills it for a larger amount, or to a different person, and it is passed in the course of business without notice of the facts, the maker is bound by the instrument. And so of a note or bill already filled up and intrusted by the maker or drawer to be delivered for a particular purpose or to a particular individual, or on a contingency, and the instrument is negotiated contrary to the intention of the maker, to an innocent person. It is the duty of the maker to see that his negotiable paper does not improperly get into circulation, and failing to do so, he must suffer the consequences of his negligence. Young et al. v. Ward, 21 Ill. 225; Geddes v. Blackmore, 32 N. E. Rep. 567.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee sued the appellant upon a promissory note. The note was made to one Cone, and it may be conceded that the appellee had no better title to the note than Cone had.

The appellant signed a printed blank of a promissory note, and intrusted it to one Cartwright to buy a horse of Cone for fifty-one dollars. Cartwright testified that "Cone wouldn't take Mr. Trainor's signature on the note at all; he didn't know him, and told me he wouldn't take it," and so Cartwright bought the horse for fifty-one dollars, and one Antonides bought another for sixty dollars, and the price of

the two horses—one hundred and eleven dollars—was put into the note, which Cartwright and Antonides also signed, and delivered, thus signed by the three, to Cone. It does not appear that Cone had any notice of the relations between the appellant and Cartwright, and if he had, the note was good in his hands, and therefore in the appellee's, for fifty-one dollars. *Johnson v. Blasdale*, I. S. & M. (Miss.) 17, and *Gross v. Whitehead*, 33 Miss. 213, cited in *White v. Alward*, 35 Ill. App. 195, are exactly in point; and the statement by Daniels to the contrary (1 Dan. Neg. Inst., S. 147) is not supported by the cases he cites.

The note was indorsed in blank by Cone. The holder under a blank indorsement may fill it to suit himself on the trial, but need not do it, as it is a mere form. *Weston v. Myers*, 33 Ill. 424; *Cutting v. Conklin*, 28 Ill. 506.

The case was tried without a jury, and the only exception in the case, except for rejecting as evidence a letter from a stranger to the suit, is to the denial of the appellant's motion to dismiss the suit as against him, he being sued with Cartwright. As the appellee was, at least, entitled to recover the fifty-one dollars, that motion was rightly denied.

The testimony of Cartwright, the only witness as to what took place with Cone, was so inconsistent with his conduct that the court might well discredit it, and hold that Cone was a *bona fide* holder without notice, and therefore entitled to recover the full amount of the note. And at least Adams succeeded to Cone's rights. The judgment must be affirmed.

Peter Phillip v. Mary M. Love, Executrix, et al.

1. WITNESSES—*The Statute Does Not Disqualify*.—The statute allowing certain persons to testify does not disqualify, as witnesses, the parties to a suit. It has not created any disqualifications. Whatever disqualification of witnesses there is, either at law or chancery, exists by virtue of the common law.

2. SAME—*Equity Jurisdiction*.—Equity has no jurisdiction to enable parties to testify who are disqualified as witnesses by the law.

Phillip v. Love.

3. *SAME—Co-Suitors at Law and in Equity.*—At common law a party to the record in a suit at law can not be a witness for himself or a co-suitor, while in chancery a complainant or a defendant may examine a party to the record who is not interested on the side of the party calling him, in the matter concerning which it is proposed that he shall testify.

4. *EQUITY—Follows the Law.*—Equity follows the law; it will not give a remedy in direct contradiction of a rule of law.

5. *SAME—No Jurisdiction to Remove Disabilities of a Witness.*—A court of equity has no jurisdiction of a bill to enable a complainant to prove the facts constituting his defense to a suit at law in which he is a party defendant, his witnesses being incompetent for that purpose in a court of law.

Memorandum.—Bill in equity. Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed March 26, 1894.

The opinion states the case.

RUBENS & MOTT and HAND, MILCHRIST & SMITH, attorneys for appellant.

COLLINS, GOODRICH, DARROW & VINCENT and A. W. PULVER, attorneys for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Superior Court sustaining a demurrer to the bill of complaint of appellant, and dismissing the same for want of equity.

The bill contained in substance the following: That James M. Love, in his lifetime, through certain agents, sold to the complainant and others, a tract of land in Dakota, and that the sale was effected by the fraudulent statements and representations of the agents of said Love who concealed the fact that they were his agents, and pretended to be co-purchasers with the complainant and equally interested with him. The land was purchased upon payment of one-third in cash, the balance being represented by two notes due in one and two years after the date thereof, and secured by a mortgage upon the property. About the time of the

maturity of the first note complainant discovered the fraud, and immediately communicated with James M. Love in reference thereto, and shortly afterward a suit was brought upon the notes by one Hubbard, who claimed to be an innocent purchaser for value, before maturity.

While this suit was pending Love died, and the suit in the name of Hubbard was dismissed, and on the same date another suit was commenced in the name of Mary M. Love, executrix of the estate of James M. Love, deceased, upon the same notes. It was then claimed that Hubbard had never been the holder of said notes for value, but was merely acting as the agent for James M. Love in and about the collection thereof. The bill further charges that in the suit at law in which Mary M. Love, as executrix, is plaintiff, all of the makers of the notes are joined as parties defendant; that the notes are joint and several notes; that by virtue of the statute none of the defendants are competent as witnesses as against the executrix to prove the fraud and misrepresentation which induced the sale; that the complainant could not prove the fraud by which he was induced to join the syndicate that purchased said property, except by the testimony of his co-defendants in the common law suit. The bill makes parties defendant, said Mary M. Love, executrix, and all the other co-makers of said notes, and prays that the suit at common law may be enjoined; that the sale of said land may be rescinded, and the amount which complainant paid thereon repaid to him, and that the executrix be perpetually enjoined from seeking to enforce payment of said notes as against the complainant, or from assigning the same for that purpose; the complainant offering on his part to reconvey his interest in said land to such person or persons as the court may direct.

As stated by counsel for appellant, the principal object in the filing of this bill was to enable the complainant to prove the facts constituting his defense in a court of equity, the witnesses being incompetent for that purpose in a court of law. It said that it was contended in the court below, on behalf of the executrix, that the defendants in the common law suit were disqualified by the statute from testifying as

against the executrix, and that no change of forum, or in the form of the pleadings, could render them competent witnesses; that this was the only question discussed before the chancellor, who entered the decree dismissing the bill, and that was the view which the court finally adopted.

The bill alleges, in substance, that, by reason of the statute, neither the complainant nor any of the parties to the suit at law, begun by said executrix, are competent witnesses to prove the fraud alleged in the bill.

Appellees also urge that, under the statutes, the joint makers of the note can not testify against the executrix.

In this contention we agree with neither appellant nor appellee. The statute does not disqualify, as witnesses, the parties to any suit. The statute has not created any disqualifications. *Bradshaw, Adm'r, v. Combs*, 102 Ill. 428; *Dodgson v. Henderson*, 113 Ill. 360; *McKay v. Riley*, 135 Ill. 586. Whatever disqualification of witnesses there is, either at law or chancery, exists by virtue of, and is as old as the common law. *Nemo in propria causa testis esse debet* was the rule.

If, then, the fact that defendants to a suit at law brought by an executrix, can not testify therein in favor of one of their number, affords grounds for the interposition of a court of equity, it is a source of equity jurisdiction as old as the court of chancery itself; and it would seem that not only ought such source of jurisdiction to be treated of by text writers, but that numerous cases of such interposition ought to be found.

Bills of discovery are a well recognized head of equity jurisprudence, but the cause now under consideration is not, and is not claimed to be, such a case.

If the present suit can be maintained, then it would seem that an addition must be made to the sources of equity jurisprudence, viz.: Jurisdiction to enable parties to testify, who by the law are disqualified as witnesses, and in equity practice should be included, bills to enable persons to testify who by the rules of law are not allowed to appear as witnesses.

It is true that by the general rules of the common law a party to the record in a suit at law can not be a witness for himself or a co-suitor in the cause, while in chancery a complainant or a co-defendant may examine a defendant who is not interested on the side of the party calling him in the matter concerning which it is proposed that he shall testify. Greenleaf on Ev., Vol. 1, Secs. 329 and 361.

But we do not think that thereby exists a ground for the jurisdiction of a court of equity.

While a court of equity will restrain a party from using an unfair advantage which by accident, mistake, fraud or otherwise, he has improperly gained (Story's Eq. Juris., Sec. 885), it can not be said that an advantage existing solely by reason of rules of law is unfair, or has been improperly obtained; moreover, if the makers of the note in question, being alive, can testify to the circumstances attending its giving, while the payee, being dead, can not, will they not have an advantage?

We do not think that the Supreme Court of this State intended that the doctrine of *Bradshaw v. Adm'r, v. Combs*, and *Dodgson v. Henderson*, *supra*, should be extended beyond what was announced in those cases. Those cases are of bills brought by sureties.

The question in this case is not, could his co-makers of this note have testified for the complainant, had he, under some well-recognized ground of equity jurisdiction, sought the aid of a court of chancery, but does the fact that at law defendants are generally not, and in chancery may, in matters in which they have no interest, be witnesses for a complainant, give a court of equity jurisdiction.

Equity follows the law; it will not give a remedy in direct contradiction of a rule of law. *Bispham's Equity*; 3 Blackstone's Com., 430; Story's Eq. Juris., Secs. 11, 12 and 13; *Cowper v. Cowper*, 2 P. Will. 753.

The legislature has power to remove the disqualification of the makers of this note; if it suffers their disability to remain it is because it does not care to change in this regard the policy of the law.

Standard Oil Co. v. Morrison, Adams & Allen Co.

It is the duty of courts, both of law and equity, to have regard to the intention of the legislature. Story's Eq. Juris., Secs. 14 and 15.

It is manifest that the legislature did not intend to remove the disability of defendants when sued by an executor.

The law as left by the legislature may have defects, but it is not the province of a court of equity to do that which in its wisdom the legislature has thought best should be left undone.

It is by no means clear that in this suit the interest of complainant's co-obligors is that his bill be dismissed for want of equity. The clear eyes of a court of equity can, without the frank confession of complainant's counsel, see that the complainant's discharge involves in all probability the discharge of his co-obligors, and it is questionable if the chancellor may not look beyond the decree sought to be obtained by the testimony of defendants and see what such decree in all probability involves as to the testifying obligors, and whether, in view of what final result is to be obtained, the interest of the defendants, to obtain whose testimony this bill is brought, is not really with, instead of against the complainant.

We prefer, however, to rest our decision upon the want of jurisdiction of a court of equity to entertain this bill.

The decree of the Superior Court is affirmed.

Standard Oil Company v. The Morrison, Adams & Allen Company.

1. **DIRECTOR**—*Not Compelled to Accept Office.*—There is no rule of law which will hold a man to an acceptance of the office of director of a private corporation against his will. If elected by the corporation he may refuse to serve.

2. **ATTACHMENT**—*Fraud as a Ground for.*—Constructive fraud, with no fraudulent intent, in fact, is no ground for an attachment.

VOL. 54.] Standard Oil Co. v. Morrison, Adams & Allen Co.

Memorandum.—Attachment proceedings. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 30, 1894.

The opinion states the case.

APPELLANT'S BRIEF, ALFRED D. EDDY, ATTORNEY.

While it may not be, strictly and logically speaking, correct to say that a corporation can be guilty of fraud, yet as the purposes of the corporation can only be accomplished through the agency of individuals, there can be no doubt that if the agents conduct themselves fraudulently, so that were it a case of employment by a natural person, the principal would have been affected by the fraud, the same rule must prevail where the principal under whom the agent acts is a corporation. Wait on Insolvent Corporations, Sec. 9.

Every tort committed by a corporation necessarily involves an unauthorized exercise of corporate power; but that is no reason why the company should not be held liable for the consequences, etc. 2 Morawetz on Corporations, Secs. 726, 727; New York & New Haven Railroad Co. v. Schuyler, 34 N. Y. 30.

APPELLEE'S BRIEF, CHARLES SHACKLEFORD, ATTORNEY.

A debtor, even if in fact insolvent, while he still has dominion over his property, and by virtue of his dominion over it, may do many things with the sanction of law, which may possibly, probably, or even certainly, delay or defeat his creditors. He may prefer some, he may sell, mortgage, assign or otherwise dispose of his property as though he were not a debtor. 2 Bigelow on Fraud, 383; Lindauer v. Victor, 69 Wis. 434; Lord v. Devendorf, 54 Wis. 491; Sexton v. Wheaton, 8 Wheat. 229; Brashear v. West, Peters, 608; Jessup v. Hulse, 21 N. Y. 168; Tomlinson v. Matthews, 98 Ill. 178; Frank v. King, 121 Ill. 250.

A debtor in failing circumstances may prefer one creditor and pay him in full to the neglect of others. Cross v. Bryant, 2 Scam. 43; Howell v. Edgar, 3 Scam. 417; Powers v. Green, 14 Ill. 387; Hessing v. McCloskey, 37 Ill. 344.

Standard Oil Co. v. Morrison, Adams & Allen Co.

The law allows the failing debtor to select the recipients of his favors, and he may lawfully prefer whomsoever he chooses among his creditors, at the expense of the others. Tomlinson v. Matthews, 98 Ill. 178; Kneeland on Attachments, 164; Ruderhausen et ux. v. Atwood, 19 Brad. 58; McManus v. Mills, 19 Brad. 398.

Confessions of judgment in favor of *bona fide* creditors, for the mere purpose of preferring them, and not for the purpose of hindering, delaying or defrauding other creditors, will not sustain an attachment. Estes v. Fry, 22 Mo. App. 80.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

A suit in attachment was begun by the appellant against the appellee on December 13, 1890.

On the trial, the attachment issue was found in favor of the appellee and the attachment was quashed, and the merits on the principal cause of action being found in favor of appellant, a general judgment for the full amount of its claim was entered in its favor.

The appeal calls in question the judgment quashing the attachment.

On December 12, 1890, the appellee gave its two judgment notes to one Charles Seegers, for \$4,200, and \$13,771.82, respectively, payable on demand, and judgments by confession were entered thereon on the same day, and executions were at once issued and levied. At an earlier hour on December 12th, the appellee corporation gave its judgment note to the First National Bank of Chicago for \$10,000, the amount of its indebtedness to the bank, and judgment was entered thereon and execution issued and levied immediately, and ahead of Seegers. On December 15, 1890, the appellee corporation made a voluntary assignment for the benefit of creditors, under the statute.

Although levies of executions were made under the judgments to the bank and to Seegers, prior to the making of the assignment, all claim of priority of lien thereunder as

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against the assumption has been abandoned, and such judgments are now asserted only as entitled to share with general creditors against the estate in insolvency. The appellant alone claims a priority, and that under its attachment levied as before observed, on December 13th.

The contention of appellant is that the action of the appellee in giving to Seegers what it is claimed, was a director of the appellee corporation, the two judgment notes, was fraudulent, and, within the attachment statute, was a fraudulent concealment or disposition of the property of the corporation, so as to hinder and delay its creditors.

It is contended that the indebtedness for which the judgment notes were given to Seegers was genuine, and in good faith due from the appellee.

At the annual meeting of the stockholders of the appellee corporation, held on December 11th, Seegers was elected one of a board of five directors of the corporation, but at that meeting he refused to accept the position, and on the same day addressed a writing, which was delivered to the president of the corporation and its other four directors, most positively refusing to accept the office, or to enter upon or perform any duty as director, and he never did afterward meet with the board as a director thereof.

We know of no rule of law or ethics, which will hold a man to acceptance of the office of director of a private business corporation against his will, and the assumption that Seegers was a director of the corporation on December 12th, when the corporation executed the judgment notes to him, is, we think, unfounded. His reasons for refusing to serve as a director, appear from the evidence to have been such as any otherwise busy man might have had, and not as a part of a plan with the corporation to gain for himself undue preferential rights.

He had been, it is true, a director of the corporation during the preceding year, but his refusal to accept a re-election or to serve as such any longer, was most express and positive, and after that he can not be held to have been a director.

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There is evidence in the record that he had latterly been the financial main-stay of the corporation, and that he had come to occupy a position of hostility, financially speaking, to the corporation, and was threatening hostile measures if he were not protected; and the circumstance that the corporation made an assignment so soon after giving him the judgment notes as to make both acts part of one transaction, and thereby reduce him to the level of an unpreferred creditor, evinces no spirit of friendly purpose amounting to a fraudulent preference on its part toward him. The preference that he obtained, but could not hold, was defeated, not because of any fraud in fact, but because of the policy of the law under the assignment act.

There was no fraud, in fact, committed by the appellee in giving the judgment notes. The indebtedness was just and honest. Not being a director, even though the corporation was insolvent and known to be so both by its officers and by Seegers, the giving and obtaining the security afforded by the judgments, short-lived though it was, as opposed to the assignment act, was not a fraudulent act in itself, and there being no other basis upon which to rest the attachment, the Circuit Court properly quashed it.

The case of *Rhode v. Matthai*, 35 Ill. App. 147, is in point. It was there held that constructive fraud, with no fraudulent intent, in fact, was no ground for an attachment based upon the charge of a fraudulent conveyance of property within two years, etc. Also, *Shove v. Farwell*, 9 Ill. App. 256; *Schwabacker v. Rush*, 81 Ill. 310.

The judgment of the Circuit Court is affirmed.

**Austin W. Wright and William W. Catlin, his Assignee,
v. Charles L. Hutchinson, Ernest A. Hamill
and Margaret F. Cudahy.**

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1. ASSIGNMENT FOR THE BENEFIT OF CREDITORS—*Contemporaneous Conveyances*.—A person who is not a creditor can not maintain a bill to have contemporaneous conveyances of personal property declared an assignment for the benefit of creditors.

2. SAME—*Power of Attorney*.—Where, two partners being insolvent, one made an assignment for the benefit of creditors, and the other, denying the fact, made a trust deed of his individual property to secure the payment of his individual debts, it was held that a bill by his co-partner and assignee would not lie to have the deed declared an assignment.

Memorandum.—Bill for relief. Appeal from the Circuit Court of Cook County: the Hon. SAMUEL P. McCONNELL, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed May 27, 1894.

The opinion states the case.

COLLINS, GOODRICH, DABROW & VINCENT and GREGORY, BATH & HARLAN, attorneys for appellants.

DUPPEL, JUDAH & WILLARD, attorneys for Hutchinson and Hamill, appellees.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This cause comes here on appeal from a decree sustaining a demurrer by the appellees to a bill filed by the appellants against them, impleaded with John Cudahy, and dismissing the bill as to the appellees for want of equity.

We adopt the statement of the bill made by appellants' counsel in their brief as follows:

"It appears by the bill that in April, 1893, Wright and Cudahy entered into an agreement to buy and sell, on joint account, mess pork, on the Board of Trade in Chicago, and to share equally in the profits and losses resulting from such venture. In accordance with what seems to be a not unusual custom on the board, each of them was to buy as he saw fit and sell pork on the Board of Trade, either for present or future delivery, each conducting his transactions in his own name and upon his own personal responsibility. At that time each of the parties had bought considerable pork, and it was agreed that their joint deal should cover the pork which they had each severally so purchased. This arrangement continued until about the last of May of the

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same year, when Cudahy represented to Wright that the financial condition was becoming such that it was difficult to borrow money, and the rumor that he was engaged with Wright in this venture, made it more difficult for various firms and companies in which he was interested to carry on their business, and that those interested with him engaged in packing, etc., desired to have all the pork which he had bought, and which stood in his name, transferred, so that the contracts therefor should stand in the name of Wright, which was accordingly done. Cudahy did not then express any intention of withdrawing from his part of the venture, but it was understood between him and Wright that all of these ventures were to be carried on strictly for the joint benefit and account of Cudahy and Wright, but solely in the name of Wright.

Owing to the continued decline in provisions on the Board of Trade, Cudahy suspended on the 1st of August, 1893, and became insolvent, and on the 2d of that month Wright executed a voluntary assignment to his co-complainant, Catlin. Prior to the insolvency of himself and of Cudahy, Wright paid out on account of losses incurred upon these joint ventures the sum of \$230,000. The unpaid indebtedness of him and Cudahy on account of such joint ventures aggregates \$350,000. Cudahy never paid out or contributed any sum whatever in payment of the losses so incurred. Wright's estate has paid a dividend of five per cent to the creditors of Wright and Cudahy, and may possibly pay perhaps three per cent more. Cudahy now claims that he is not jointly responsible with Wright, and declines to account with him or Catlin, or to settle the partnership accounts between him and Wright in any way. Soon after the failure of Cudahy, some time in the month of August last, he caused to be circulated among his creditors a paper, commencing as follows:

“We, the undersigned, creditors of John Cudahy, hereby agree to accept in full settlement of claims and demands which we have at this date against him, individually or jointly with any one else, his notes for fifty per cent of the

amounts due us, and each of us, said fifty per cent of our claims and demands being as follows :”

Here follows a long list of signatures with the amounts of the various claims of the parties signing, figured on the basis of fifty per cent. The paper further provided that the payments should be secured by a trust deed given to Charles L. Hutchinson, one of the appellees, covering certain real estate in Cook county which was described therein, and also that certain other securities should be placed in the hands of the trustees to secure the payment of these notes. The trustee was given power to sell and dispose of the real estate and other securities at any time before the maturity of the notes whenever best in his judgment and for the advantage of the creditors and Cudahy. It was further provided that at any time before the disposition of said real estate and securities, Cudahy might release any of the same by paying into the hands of the trustee the amount in cash set opposite each piece of said real estate and opposite each of the other securities, and thus have the same released from the operation of the trust. Afterward Cudahy offered to each of his creditors his note for the remaining fifty per cent of his indebtedness, and as additional security for the payment of all of his notes, his five notes for \$100,000 each, payable in one, two, three, four and five years after date, respectively, to be indorsed by his brothers, Michael, Patrick and Edward Cudahy, and to be placed in the hands of Hutchinson, trustee.

This arrangement was carried out and assented to by the great majority in number and amount of his creditors, and the property therein referred to was duly transferred and conveyed to Hutchinson, and the notes therein referred to duly executed, and on the 18th day of August, 1893, John Cudahy, with his wife, who is also a defendant to the bill, executed and delivered to Hutchinson a deed of trust, conveying to him in trust, for the purposes of this arrangement, the real estate referred to in the first proposition to his creditors, which is more particularly described in the deed. Ernest A. Hamill, the third appellee, is successor in trust

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in this deed of trust. The bill further alleges that there was neither joint property nor any joint fund, owing to the method in which the business of the partnership between Wright and Cudahy was conducted, and that by the assignment to Hutchinson a trust is created in favor of the creditors of Wright and of Cudahy, which should be enforced, in view of the fact that Wright had paid upward of \$230,000, on account of the debts and losses of this partnership, and his estate had paid the further sum of \$20,000. It is also alleged, on information and belief, that Cudahy has large amounts of property other than that by him conveyed to Hutchinson, and that sundry persons named were at the time this proposition was made to them by Cudahy, creditors of Wright and Cudahy as partners, in a considerable amount. The bill prays an accounting of the partnership, that a receiver may be appointed, that Cudahy may be decreed to pay to such receiver such sum as shall upon a full accounting appear to be due from him, and that the transfer from Cudahy to Hutchinson be decreed to be an assignment for the benefit of all the creditors of Cudahy, and that Hutchinson be removed and some suitable person appointed to administer upon the estate in the hands of Hutchinson, and act as receiver in the case.

As to the defendant, John Cudahy, who also demurred to the bill, the demurrer was overruled, presumably on the ground that as to him a case was made for a partnership accounting, but as to the appellees the demurrer was sustained and the bill dismissed for want of equity.

As stated by appellants' counsel, the theory upon which the bill is sought to be maintained as against the appellees is, that the transfers by Cudahy to Hutchinson are in effect a general assignment for the benefit of all his creditors, and that the relation of Wright, and Catlin, his assignee, to this transaction, is such that they are entitled to invoke the jurisdiction of equity to enforce the trust thus created for the benefit of such creditors of Wright and Cudahy.

We are unable to see upon what ground either Wright, or his assignee, Catlin, may maintain this bill against Hutchinson and his co-appellees.

Wright is not, at present at least, in the attitude of a creditor of Cudahy, and his assignee is merely another self to him.

Assuming that under the rule adopted in *Farwell v. Cohen*, 138 Ill. 216, the trust conveyance by Cudahy to Hutchinson operated, by construction of law, as an assignment for the benefit of creditors—not of Cudahy alone, but also of the partnership of Wright and Cudahy—Wright himself is in no position to claim in a court of equity the benefit of such a trust as would be thereby created.

The case of *Preston v. Spaulding*, 120 Ill. 208, is not in point, if for no other reason than that there Spaulding was a creditor, while here Wright is not, and for anything appearing in the bill may never be. The mere fact that Wright has paid more of the partnership losses than have been paid by Cudahy, while probably availing much in the matter of an accounting between them, entitles him to no standing in equity against Hutchinson, the trustee for Cudahy's individual creditors.

Non constat but that Wright may have received profits to an extent equal to, or exceeding the losses he has paid in the partnership transactions, and he may not even have anything of Cudahy until there has been a full accounting between them.

How, then, may he claim to be a beneficiary of the trust conferred upon Hutchinson for the use of Cudahy's creditors?

It is doubtful, even, if the partnership creditors could resort to a court of equity to enforce their claims against the trust bestowed upon Hutchinson. There were other elements of an equitable character than the mere relationship of a creditor, that gave jurisdiction in the case of *Preston v. Spaulding*, *supra*.

It would seem as if under the doctrine of *Farwell v. Cohen*, the only forum for the partnership creditors, even, to resort to, under the facts as made to appear by this bill, in order to obtain to themselves the benefit of the trust to Hutchinson, would be the County Court.

Crofut v. Aldrich.

We make this remark, however, not by way of decision, for the question is not in this case, but to place in a yet stronger light our conclusion that a court of equity can not afford Wright, who is not even a creditor, the relief asked by this bill.

No precedent that we are aware of will warrant maintaining such a bill, and it would be opposed, in our opinion, to reason and principle to sustain it.

The decree of the Circuit Court dismissing the bill as to these appellees, will therefore be affirmed.

Mary S. Crofut v. Frederick C. Aldrich.

1. **SURETY—Signature Obtained by False Pretenses.**—The fact that a married woman was induced to sign judgment notes upon representations that her signature was necessary to release her dower in real estate conveyed as security for the notes, can not be relied upon as a fraud, avoiding her obligation.

2. **CONSIDERATION—Promissory Note—Accommodation Signer.**—Where a promissory note at its maturity is renewed by another note like the first one, for the reason that the owner does not like to hold over-due paper, and his attorney induces an outside party to sign the new note without any new contract being made, such signing is without consideration, and the note as to such person is void.

Memorandum.—Confession of judgment. Error to the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded with directions. Opinion filed May 28, 1894.

The opinion states the case.

BRIEF OF PLAINTIFF IN ERROR, W. HECKMAN AND J. G. ELSDON, ATTORNEYS.

Fraud and circumvention in the procurement of a note is a defense to an action thereon. *Easter v. Minard*, 26 Ill. 495; *Glazier v. Streamer*, 57 Ill. 91; *Richardson v. Schirtz*, 59 Ill. 313; *Hewitt v. Jones*, 72 Ill. 218.

And if plaintiff in error were to be held as a surety, such

fraudulent representations made to her would relieve her from liability as surety. 1 Brandt on Suretyship, Section 234.

As between the parties to it fraud vitiates all acts. Jamison v. Beaubien, 4 Ill. 114; Rodgers v. Brent, 10 Ill. 573.

Especially is this so in cases of judgment by confession, for the reason that courts of law have always exercised an equitable jurisdiction over judgments by confession upon warrants of attorney, to open or set them aside as equity may require. Lake v. Cook, 15 Ill. 353; Heeley v. Alcock, 9 Brad. 432; Walker v. Ensign, 1 Brad. 113; Condon v. Breese, 86 Ill. 160.

And so when the parties stand on an unequal footing, and the one making the representations is an expert in the matter in hand, or has means of knowledge not open to the other. 8 Am. and Eng. Ency. of Law, 644.

Such representations, if false, will be fraudulent in many cases in which there would be no actionable fraud if the parties stood on the same footing. Hicks v. Stevens, 121 Ill. 186; Townsend v. Cowles, 31 Ala. 428; Cooke v. Nathan, 16 Barb. (N. Y.) 342; Colter v. Morgan's Administrators, 12 Mon. (Ky.) 278.

BRIEF OF DEFENDANT IN ERROR, MARSTON, AUGUR & TUTTLE,
ATTORNEYS.

The misrepresentation of the legal effect of a written agreement which the party signs with knowledge of its contents, is not sufficient ground at law for avoiding the agreement. Kerr on Fraud and Mistake, 90.

A representation of what the law will or will not permit to be done is one on which the party to whom it is made has no right to rely. If he does, it is his own folly and he can not ask the law to relieve him from the consequences. The truth or falsehood of such representations can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such. Fish v. Cleland, 33 Ill. 238; Dennis v. Piper, 21 Ill. App. 169; Washington v. L. & N. R. R. Co., 34 Ill. App. 658.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

December 29, 1893, judgment by confession was entered in the Circuit Court in favor of Aldrich, and against Ira C. Woodward, Charles H. Crofut and Mary S. Crofut, for \$8,916.82, upon two promissory notes for \$4,000 each, dated October 1, 1890, one payable in three, and the other in four years after date.

With each note was a warrant of attorney authorizing judgment before maturity for the principal and accrued interest, which was seven per cent, payable half-yearly, after thirty days default in the payment of interest. Each note stated that separate notes were given for the installments of interest. No other evidence was before the court upon the entry of the judgment than the principal notes, warrants of attorney and an affidavit to the genuineness of the signatures to them.

The judgment included \$500 attorney's fees, and it must also have included \$416.82 as interest, to make the sum of the judgment.

The declaration, as in *Follansbee v. Scottish Am. M'tge Co.*, 5 Ill. App. 17, alleged the default in paying interest, and the election of the holder of the notes to have the principal of the four-year note become due.

It would seem that the mere fact that he took steps to enter the judgment proved his election, but without the production of the interest notes showing that they were still in his hands, which would be *prima facie* evidence that they were not paid, there could be no presumption that the interest notes were unpaid.

The case cited is authority that the order of the Circuit Court denying the motion made by the defendants below to set aside the judgment was erroneous.

There is a more important question in the case.

Woodward made an affidavit that these notes were given in place of former, past due, like notes, signed only by himself and Charles H. Crofut, in pursuance of negotiations between himself and Aldrich, in which they agreed upon new notes like the first ones, with no mention of, or allusion to,

any additional security, but simply and only for the reason that Aldrich did not like to hold over-due paper.

And all of the defendants below made affidavits that Mary S. Crofut signed the notes, only because the attorney of Aldrich—Aldrich not being present—represented that her signature to all the papers was necessary to bar her dower in real estate conveyed as security for the notes.

Such representations as to legal effect can not be relied upon as a fraud, avoiding her obligation if she incurred any. *Stover v. Mitchell*, 45 Ill. 213.

But “no executory, simple contract is valid without a consideration” (Bishop on Cont., Sec. 40), though the burden of showing the negative is upon the maker of a promissory note. And the motive prompting the act which is evidence of a contract, may not be a consideration at all. *Ibid*, Sec. 37.

Now, if it be true that the whole bargain for new papers was made as Woodward states it, and that the attorney had no discretion or authority but to carry into effect that bargain already made, his act in inducing Mrs. Crofut to sign the notes is no more a consideration than the same act would have been had she, a month after the papers had been made, and without her signature, accepted, then signed them.

If Woodward’s story be incredible, the court would not err in disregarding it; but if it be only improbable, Mrs. Crofut has the right to the verdict of a jury upon it.

The order denying the motion is reversed and the case remanded with directions to the Circuit Court to set aside and vacate the judgment with costs to the defendants below.

That will end this litigation, and the plaintiff below will then be at liberty to begin anew.

MR. JUSTICE WATERMAN.

No showing was made that the judgment is for any amount not due, or is in any respect unjust; no affidavit was filed setting forth that default had not been made in the payment of interest or denying that an election to declare the entire amount due had been made.

Norton v. Volzke.

Appellee gave adequate consideration for the signature of Mrs. Crofut, viz., an extension; that consideration appellants have obtained and can not be deprived of.

That appellee would have given the extension without Mrs. Crofut's signature, can not be known; this only is certain—he did not. A valid consideration moved from him; the consideration in every case of a mere surety is not to him, but from the promisee. To hold that a mere surety may be released from a promissory note he has signed by his showing that the payee did not care for the sureties' signature, or that the payee's agent was not directed to require a surety, is fraught with danger.

Should the judgment have been set aside for errors of law? The warrant of attorney authorized a release of errors, and one was filed. The court had jurisdiction to enter the judgment, and errors have been released. The Circuit Court was not, therefore, bound on account of such released errors to set aside the judgment.

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Oliver W. Norton and Edwin Norton v. John Volzke, an Infant, by August Volzke, His Next Friend.

1. MASTER AND SERVANT—*Employment of Minors*.—The law does not require that a child shall exercise the same degree of care and caution as a person of mature years, but only such care and caution as a person of such age and discretion would naturally and ordinarily use.

2. SAME—*Contributory Negligence of a Child*.—The rule as to contributory negligence of a child is, that it is required to exercise only that degree of care which a person of that age would naturally and ordinarily use in the same situation and under the same circumstances.

3. INSTRUCTIONS—*May Imply Without Assuming Facts*.—The giving of an instruction which implies that evidence tending to prove the "status of case" is before the jury, is not reversible error.

4. SPECIAL INTERROGATORIES—*Theoretical Errors*.—It is not error to refuse to submit a special interrogatory when the answer to it would not be decisive of the case.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, pre-

siding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 19, 1894.

The opinion states the case.

APPELLANTS' BRIEF, R. S. THOMPSON, ATTORNEY.

The employe assumes, as part of his contract of hiring, all the ordinary known dangers of his employment. Indianapolis, B. & W. R. R. Co. v. Flanigan, 77 Ill. 365; Illinois C. R. R. Co. v. Cox, 21 Ill. 20; Richardson v. Cooper, 88 Ill. 270; Pennsylvania Co. v. Lynch, 90 Ill. 333.

The fact that the employe is a child, does not free him from the operation of this rule. Gartland v. Toledo W. & W. R. R. Co., 67 Ill. 498; Glover v. Gray, 9 Brad. 329; Buckley v. Gutta Percha Mfg. Co., 113 N. Y. 540; DeGraff v. N. Y. C. & H. R. R. Co., 76 N. Y. 125; King v. B. & W. R. R. Co., 9 Cush. 112.

It is not the duty of an employer to instruct a servant as to an obvious danger, even though the servant be a minor. O'Keefe v. Thom, 16 Atl. Rep. 737; Castello v. Judson, 21 Hun (N. Y.); Pittsburgh R. R. Co. v. Adams, 105 Ind. 151.

If the employe has gained a knowledge of the dangers of his employment from experience or other source, the failure of the employer to caution him as to such dangers will not make him liable for injuries received by the employe. Buckley v. Gutta Percha Mfg. Co., 113 N. Y. 540; Herman-Harrison Milling Co. v. Spehr, 145 Ill. 329; Palmer v. Harrison, 57 Mich. 182; Sullivan v. India Mfg. Co., 113 Mass. 399; Downey v. Sawyer, 32 N. E. 654.

The burden is on the plaintiff to prove that he was a person of inexperience and immature judgment, and incapable of appreciating the danger of his situation. Chicago Anderson Pressed Brick Co. v. Reinneigar, 140 Ill. 334; Sullivan v. India Mfg. Co., 113 Mass. 399.

If the employe continues in the employment after knowledge of its dangers, he can not, after injury, complain that the danger might have been lessened by the employer. Sullivan v. India Mfg. Co., 113 Mass. 399; Stephenson v. Duncan, 73 Wis. 404; Shaw v. Sheldon, 3 N. Y. St. Rep. 679.

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An employer is not bound to provide absolutely safe machinery. *Shroeder v. Mich. Car Co.*, 56 Mich. 132; *Weber Wagon Co. v. Kehl*, 139 Ill. 657; *Camp Point Mfg. Co. v. Bellar*, 71 Ill. 421; *T. W. & W. Ry. Co. v. Asbury*, 84 Ill. 429; *Shearman & Redfield on Neg.*, Secs. 87-92; *Moulton v. Gage*, 138 Mass. 390.

A servant who voluntarily exchanges his usual and proper place of work for one more dangerous, can not recover for injuries resulting from such change of position. *Sinclair v. Bernt*, 87 Ill. 174; *Brown v. Byroads*, 47 Ind. 435; *St. Louis Bolt & Iron Co. v. Brennan*, 20 Ill. App. 555; *St. Louis Bolt & Iron Co. v. Burke*, 12 Ill. App. 369; *Coal Run Coal Co. v. Jones*, 127 Ill. 379.

An employer is not liable to his servant when the cause of the injury is purely accidental. *Lewis v. Flint & Pere Marquette R. R. Co.*, 54 Mich. 55; *Richards v. Rough*, 53 Mich. 212; *Hickey v. Taafe*, 105 N. Y. 26; *Gassaway v. Ga. So. R. R. Co.*, 69 Ga. 347; 14 Am. & Eng. Enc. Law, 890.

An employer is not negligent in pursuing a certain line of conduct where nothing has ever occurred to suggest it to be negligence in the master in so doing.

As no similar accident has ever before occurred, such want of previous experience was conclusive as to the absence of negligence in the defendant. *Dougan v. Champ. Trans. Co.*, 56 N. Y. 1; *Sutton v. N. Y. C. R. R. Co.*, 66 N. Y. 243; *Kittermingham v. Sioux City R. R. Co.*, 62 Ia. 285.

The mere relation of master and servant can never imply an obligation on the part of the master to take more care of a servant than he may reasonably be expected to take of himself. *Priestly v. Fowler*, 3 M. & W. 1. Or more care of the servant than the servant may reasonably be expected to take of himself. *Missouri Furnace Co. v. Abend*, 107 Ill. 44.

The element of comparison is the essence of the rule of comparative negligence, and an instruction which fails to institute a comparison of the negligence of the plaintiff with that of the defendant is erroneous. *First Nat. Bank v. Eitemiller*, 14 Ill. App. 22; *Moody v. Peterson*, 11 Ill. App.

180; Pittsburgh, Cinn. & St. Louis R. R. Co. v. Shannon, 11 Ill. App. 222; C. & E. I. R. R. Co. v. O'Connor, 13 Ill. App. 66; E. St. L., P. & P. Co. v. Hightower, 92 Ill. 139.

APPELLEE'S BRIEF, PEASE & McEWEN, ATTORNEYS.

Infancy at any age is a fact tending to prove incapacity. Herdman v. Spehr, 46 Ill. App. 24.

No rule can be laid down as to the negligence of infancy; it is always a question of fact. C. C. Ry. Co. v. Wilcox, 138 Ill. 370.

Master can not direct servant to work in a dangerous place. Consolidated, Ice Machine Co. v. Kifer, 26 Ill. App. 466.

And a willful neglect to provide proper protection to an employe in a dangerous occupation is gross negligence. C. & E. I. R. Co. v. Huirs, 33 Ill. App. 271.

The rule that the employe assumes the risk of his employment does not apply to young persons; the infant must be informed of his danger. Herdman v. Spehr, 145 Ill. 329.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee, a boy who had been at work for the appellants about six months, had a portion of the fingers of his right hand cut off in some cog wheels, while he yet lacked nearly five months of being eleven years old. There is testimony, contradicted, that when he applied for employment he said his age was thirteen years. In doing his work the evidence seems to be pretty clear that he sat on a box, with his back toward, and about one foot from, the cog wheels; but whether he ought to have been in that position, or stood upon the other side of the machine, is the subject of conflicting testimony. In the position he did occupy he worked with his left hand, reaching upward to some light cans being carried forward by the machine, his business being to keep the cans in order, and pick out defective ones.

There were two of these cog wheels, one over the other, about three inches in diameter, the cogs probably seven-eighths of an inch long, and the wheels turned in upon each other on the side toward the boy. The evidence states the

distance that they projected from the side of the machine at from five to eight inches. On the same shaft with the lower one, was a sprocket wheel, somewhat larger than the cog wheel, and about two inches further out, on which a chain belt, extending upward and backward from the boy, ran. This sprocket wheel and chain were the only protection in the nature, or serving the purpose, of boxing, about the cog wheels.

The boy is the only witness as to the manner in which his fingers got between the cogs, and he says that reaching up with his left hand for a can, with his right hand on the box, he jerked the can out, the box slipped, and his right hand went back into the cogs.

Testimony was put in, without objection, that after the accident, the cog wheels on that machine and on all machinery were boxed up. It is not improbable that a skilled and experienced mechanical engineer would have seen that it was prudent to so box them before any accident.

In principle, the case is not distinguishable from *Chicago Anderson Co. v. Reinneiger*, 41 Ill. App. 324, S. C., 140 Ill. 334, and *Ames & Frost v. Strachurski*, 145 Ill. 192; and it is not difficult to account for verdicts in favor of the injured, in all that class of cases. *Goss & Phillips v. Suelaw*, 35 Ill. App. 103.

The instructions given for the appellee, to which appellants object, are as follows:

“No. 1. The jury are instructed that in determining the relative degrees of care, or want of care, manifested by the parties at the time of the injury, the age and discretion of the party injured are proper subjects of inquiry for the jury. The law does not require that a child shall exercise the same degree of care and caution as a person of mature years, but only such care and caution as a person of his age and discretion would naturally and ordinarily use.

No. 2. The jury are instructed that the rule as to contributive negligence of a child, is that it is required to exercise only that degree of care which a person of that age would naturally and ordinarily use, in the same situation and under the same circumstances.

No. 3. The court instructs the jury, as a matter of law, that if a person receives an injury as a combined result of an accident and of negligence on the part of another, and the accident would not have occurred but for such negligence, and the danger could not have been foreseen or avoided by the exercise of reasonable care and prudence, on the part of the person injured, taking into consideration all the facts and circumstances of the case, then the person guilty of the negligence will be liable for the injury received.

No. 4. If, from the evidence in the case, and under the instructions of the court, the jury shall find the issues for the plaintiff, and that the plaintiff has sustained damages, as charged in the declaration, then to enable the jury to estimate the amount of such damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jury may themselves make such estimate from the facts and circumstances in proof, and by considering them in connection with their own knowledge, observation and experience in the business affairs of life."

It is said that these instructions assume the facts, and if we were to follow the words of the opinion in *Chambers v. People*, 105 Ill. 409, that "the fact that the court assumes to state law applicable to particular states of case, is, of itself, an assumption that those states exist," we should be compelled to so hold. That such instructions do imply that evidence tending to prove the "status of case" is before the jury is doubtless true, but they imply no more. They are abstract—assuming nothing.

Such a form of instructing is not approved by the decisions in this State, but those decisions held that it is not *per se* error. *Little v. Munson*, 54 Ill. App. 437.

Yet in *Hill v. Ward*, 2 Gilm. 285, it was held that the refusal of abstract instructions was erroneous.

The phrase "under the instructions of the court" in the last is objected to on the authority of *Kranz v. Thieben*, 15 Ill. App. 482, which is not quite in point. The words here mean that if from the evidence, and upon the law as

given, the jury find, etc., which is exactly what the jury ought to do.

The appellants asked the court, and the court refused to submit questions for the jury to answer, as follows:

“Did the defendants omit to do anything that ordinarily prudent and careful persons would have done under the circumstances?”

Did the defendants do anything that ordinarily prudent and careful persons would not have done under the circumstances?”

An answer “no” to the first question would have been decisive of the case, and the question should have been left to the jury.

But in answer to a question propounded by the court, they have said that the appellants should have placed a guard or cover about the cog wheels, which is equivalent to answering “yes” to the first question.

The error, therefore, in not submitting the question, is only theoretical. To the second question “yes” or “no” would not have been decisive of the case. C. & N. W. Ry. v. Dunleavy, 27 Ill. App. 438, S. C., 129 Ill. 132; C. & N. W. Ry. v. Bouck, 33 Ill. App. 123.

The refusal of that question was right. On the whole case there is no real error, and the judgment is affirmed.

**New York, Chicago and St. Louis Railroad Company
vs. Fredrich Luebeck, by Gotfried Luebeck, His Next Friend.**

54	551
157	595
54	551
69	225

1. ACCIDENTS—*Negligence and Due Care—Questions for the Jury.*—Under the circumstances usually surrounding an injury by a railroad train, negligence and due care, and degrees and comparisons of negligence, are questions of fact for the determination of a jury. An interference therewith by a court of review is not warranted by law, unless it is apparent that the jury have disregarded their duty.

2. TESTIMONY—*Striking Out.*—Where the legitimate effect of an answer to a question is not injurious to a party making a motion to strike it out, denying the motion is not reversible error.

3. DANGEROUS AGENCIES—*Degree of Care*.—Where a party employs a dangerous agency in his business, he must exercise a degree of care commensurate with the dangers of the situation.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed July 2, 1894.

The opinion states the case.

WALKER & EDDY, attorneys for appellant.

MORAN, KRAUS & MAYER, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$10,000, recovered in an action of trespass brought by the appellee against the appellant.

The injury for which the recovery was had occurred at the crossing of 53d street in Chicago, by the appellant's tracks on May 17, 1889.

At the time of the accident the appellee was about sixteen years of age, and the trial took place about four and one-half years afterward, when he was twenty.

It is not denied that the appellee was struck by one of appellant's locomotives at the place stated, and the evidence tended to show that he was thrown by the blow a distance of about twenty-five feet.

The evidence tended to disclose that a permanent and serious mental impairment resulted to the appellee from the stroke of the locomotive.

A very considerable amount of evidence, by physicians and others, covering the period of four and one-half years from the time of the accident to the date of trial, was heard upon the subject of appellee's mental infirmity after the blow, and it is evident that the jury believed from such evidence that a permanent impairment of appellee's mind was produced to an extent seriously interfering with, if not wholly unfitting and incapacitating the appellee from attending to the ordinary business affairs of life.

In the very nature of things there will always remain room for inquiry and uncertainty upon a subject so incapable of exact demonstration as mental capacity at one time as compared with that at another. For that reason, if for no other, it is impossible for a court of review to say from an inspection of a record, upon which there appears evidence in support of a conclusion reached by a jury upon such a question, that it should have been determined the other way.

Whether the disabling effects will be permanent, in the sense of affecting the appellee during all his life, may be said to be conjectural, but that they have lasted more than four years, with no diminishing tendency, seems to be pretty clearly established by competent evidence; and, judging from the evidence alone, we can not say that the conclusion arrived at by the jury as to the effect produced upon mental capacity of the appellee by the shock of the stroke inflicted upon him, was not fully warranted.

With a permanent disability of such a nature, the judgment, though large, is no more than just compensation.

At the time and place of the accident, the physical situation was substantially as follows:

There were seven railroad tracks running north and south across 53d street, at right angles, over some of which the appellant company had the right to operate its trains; the east track was a side track, on which was standing a string of freight or stock cars extending across part of the north half of 53d street; the second track from the east was the track on which appellant's train that struck the appellee was moving toward the south; on the third track from the east there was a train moving toward the north, and on the fourth track from the east another train, belonging to the appellant, was moving toward the south; the fifth, sixth and seventh tracks, from the east, seem to have been unoccupied at that moment; the railroad bed was higher than the surface of the street at a little distance away, and from the east, the approach of the street, which was not graded to the tracks, was up an incline of a few feet.

Although one witness for appellant testified that the appellee was, at the moment of being hit, crossing the tracks from the west, the decided preponderance and weight of the evidence establishes that he approached the tracks from the east, and was going westwardly across the tracks on an errand for his brother; that when he reached the tracks, he passed around the south end of the string of cars that partly occupied 53d street, on the side track, without observing the train that was approaching from the north on the second track; that his view of that approaching train was obstructed by the standing cars, around which he passed, until he got past them; that his attention was absorbed in watching the passing north bound train on the third track over which his route lay; that he paused for a moment, for the caboose of that train to pass, and was instantly run upon by the south bound train on the second track.

There was evidence from which the jury could find that no bell was rung, or other warning given, by the approaching train that ran upon the appellee.

The locomotive was being run backward, or "tender forward," and the rate of speed was from twenty miles an hour, according to the testimony of appellee's witnesses, to eight miles per hour, according to appellant's witnesses.

It was a freight train that ran upon the appellee, and an ordinance of the town of Lake, within which jurisdiction the territory where the accident occurred was then situated, prohibited the running of freight trains within the town at a greater rate of speed than six miles per hour.

Under such circumstances, "negligence and due care, degrees and comparisons of negligence, are all questions of fact for the determination of a jury," and an interference therewith by a court of review is not warranted by law, unless it is apparent that the jury have disregarded their duty. *C. & N. W. Ry. Co. v. Traves*, 33 Ill. App. 307.

The instructions were as favorable to appellant as could properly have been given, and under the law of the instructions, and the evidence heard, the jury found adversely to the appellant both as to the question of appellant's own neg-

ligence and the contributory negligence of the appellee, and their verdict must stand. I. C. R. R. Co. v. Nowicki, 146 Ill. 29; same case, 46 Ill. App. 566.

It is contended that error was committed by the court in refusing to strike out the answer of one of appellee's witnesses to the question whether he knew where the appellee was going at the time of the accident. The witness answered "Yes, I sent him to get some glass at Wentworth avenue."

It does not appear in which direction Wentworth avenue lay from the place of the accident, but assuming that it lay to the west, and that therefore the answer had a tendency to support the theory that the appellee was going westwardly and had come upon the tracks from behind the cars standing upon the side track, whereby his view of the approaching train was obstructed, we do not regard the contention as well taken.

The question itself was not objected to. The motion and exception related only to the answer. Strictly speaking we can not approve of the question, but unless the answer was harmful to the appellant, it ought to be allowed to stand. The same witness testified, in answer to other questions, that within about five minutes after he had sent the appellee upon an errand he was called from his butcher shop and told that appellee had been run over. The legitimate effect of the answer was no more, therefore, than that five minutes before the appellee was hurt, the witness had seen and spoken to the appellee at a point two short blocks east of the place where the accident occurred, and therefore the inference or conclusion that he was going west. And this was but in corroboration of what was proved by a decided preponderance and weight of other evidence, as to the direction in which appellee was going when he was run upon. It made no difference whether he was going for glass or was going to Wentworth avenue, if he was in fact going westward across the tracks. We think it was not material error to refuse to strike out the answer.

It is again contended that the court erred in admitting evidence as to the frequency of trains going over that cross-

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ing per day. And this is urged because other railroads used the same tracks, and that appellant should not be prejudiced on account of their frequent trains.

Such evidence was proper in order to show the degree of care which appellant was bound to employ under the circumstances.

If appellant chooses to operate its trains over tracks that are used by other railroads to an extent that render their operation dangerous—in other words, if it chooses to employ a dangerous agency in its business, it must exercise a degree of care commensurate with the dangers of the situation.

We think the court committed no error in admitting the evidence.

The judgment will be affirmed.

54	556
54	379
54	556
70	196
54	556
81	87
81	210

**West Chicago Street Railroad Company, West Chicago
Street Railroad Tunnel Company, Charles T.
Yerkes et al. v. Morrison, Adams &
Allen Company.**

1. **FREEHOLD—*Liberum Tenementum*.**—In an action of trespass *quare clausum fregit*, the plea of *liberum tenementum* when replied to specially that the premises were not the close and freehold of the plaintiff, necessarily involves a freehold.

Memorandum.—Trespass *quare clausum fregit*. In the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Plea of *liberum tenementum*; replication; appeal. Heard in this court at the March term, 1894, and appeal dismissed. Opinion filed July 2, 1894.

EDMUND FURTHMANN, attorney for appellants.

CHARLES SHACKLEFORD, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was an action of trespass *quare clausum fregit*, brought by the appellee against the appellants, for the forci-

Springer v. Borden.

ble breaking into appellee's business house and expelling it therefrom.

Among other pleas filed to the declaration was one of *liberum tenementum*, and to such plea the appellee replied specially, that the premises were not the close and freehold of the appellants.

"The plea of *liberum tenementum* necessarily, where, as here, it is directly put in issue by the replication, involves a freehold." Piper v. Connelly, 108 Ill. 646; Sanford v. Kane, 127 Ill. 591; Town of Brushy Mound v. McClintock, 146 Ill. 643; Pratt v. Kendig, 30 Ill. App. 281.

Therefore this court has no jurisdiction of this appeal, and it will be dismissed.

Warren Springer v. John Borden.

1. LEASE—*Failure to Fix Rents by Arbitration—Equity.*—By the provisions of a lease the value of certain premises was to be fixed every ten years by the award of arbitrators as a basis upon which to compute the rents, and in case of a failure to make such award, then unless all the parties interested could at once agree upon such value, any person interested might apply to a court of record in the county, to have the value ascertained, and its judgment in the premises should be binding upon all persons concerned. The arbitrators having failed to make the award, the court acted in the matter and fixed the value under the lease: *Held*, the action was legal and binding upon all parties in interest.

2. RENTS—*Fixed by Proceedings in Court—Res Adjudicata.*—A judgment in an action at law, based upon the cash value of premises for rent due under the terms of a lease making provisions for such adjudication, is *res adjudicata* as to the basis upon which rent is to be computed and paid, up to the time for the next fixing of such value.

3. COURTS OF EQUITY—*Sitting to Find a Single Fact.*—Where a court of equity obtains jurisdiction for the purpose of fixing the cash value of the premises under the provisions of a lease as a basis upon which to compute rent, it may make a decree for the payment of all rent which upon such basis is due and payable under the terms of the lease, at the time of the filing of the bill; nor is the court ousted of jurisdiction to render a decree, because it may have stopped short of awarding the relief it had power to give.

Memorandum.—Bill in equity to have the value of a lot of land in the city of Chicago on the 1st day of January, 1892, ascertained and fixed

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154s	668

under the provisions of a lease. Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed July 2, 1894.

The opinion states the case.

PECK, MILLER & STARR and WM. J. AMMEN, attorneys for appellant.

WILSON, MOORE & McILVAINE, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

As stated by appellants in the brief by them filed, "This was a bill in equity to have the value of a lot of land in the city of Chicago on the first day of January, 1892, ascertained and fixed." The only specific prayer for relief contained in the bill was "that this honorable court may ascertain and fix the cash value of said lot three (3), exclusive of the buildings and improvements thereon, on the first day of January, A. D. 1892, in the manner and for the purpose specified in the said lease above mentioned from your orator to George H. Taylor." And the only relief which the court gave on the final hearing was to find and order, adjudge and decree that the cash value of the said premises, exclusive of the buildings and improvements thereon, on January 1, 1892, was \$300,000, "and that the said sum be taken and treated in all respects as the value of said premises at said time, for the purpose of ascertaining and fixing the rental to be paid under said lease for the ten years beginning January 1, 1892, and that the rights of the complainant, and of the other parties to the said lease, and to said proceeding, be in all respects the same as if the said sum had been found and ascertained to be the cash value of the said demised premises at said date, in the manner provided by the terms of the said lease."

The subject-matter of this suit was the ascertaining and fixing the value of certain premises. The provisions of the lease upon this matter were as follows:

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“And it is further mutually agreed between the parties hereto, that in order to ascertain the said cash value of said demised premises, as before specified, at each of the above dates, the person or persons then interested on either part hereto may, not exceeding ninety days prior to each of such dates, select a competent and disinterested person, who shall be at the time a resident of the said city of Chicago, and the owner of a freehold in the South Division thereof, and notify the person or persons then interested on the other part hereto of such selection, whereupon he or they shall, within fifteen days thereafter, select another person of like character and qualifications, and notify the person or persons making the first selection of such second choice, whereupon the two persons thus chosen shall select a third person of like character and qualifications as above, or if the two can not agree upon such third person, each of them shall name one person, of which two the one to serve shall be determined upon by lot in any manner mutually agreed upon by the two persons already chosen, and the three so selected, having been first duly sworn, shall fix a time and place of meeting, and notify the persons interested, at which, as well as at all adjourned meetings, the persons interested shall be entitled to be heard with their proofs, after which the said appraisers, or a majority of them, shall render their award in writing, subscribed by them, or a majority of them, of the then cash value of said demised premises, exclusive of the buildings and improvements thereon, which award shall be made in duplicate, with a copy of the oaths of the appraisers thereto attached, and be delivered to the person or persons then interested on the side of the first and second parts hereto, one copy to and for each party, which value, when so found in a legal, just and valid manner, shall be assumed and taken to be the said cash value of said demised premises as above specified at the respective date for which said appraisers may have been chosen and selected.

And it is further mutually agreed between the parties hereto, that if the person or persons on either part hereto, being legally competent to do so, shall fail or neglect to

appoint an appraiser, and give notice thereof within the time above limited, after such other party first moving in the matter shall have selected an appraiser and given notice thereof as above, such party who shall have made such first selection, shall be and is or are hereby irrevocably authorized, on behalf of the party so failing or neglecting, to select one of the character and qualifications as above for the party so failing or neglecting, which two shall proceed to select the third in the manner as above, which three, so chosen, shall proceed as above provided to make the award, which award, when made and delivered as aforesaid, shall stand the same as, and be as valid and binding as if no failure or neglect to appoint or select an appraiser had occurred.

And it is further mutually agreed between the parties hereto, that if for any cause whatever a valid and just award shall fail to be made at any of the said times, or shall not be made and completed by the time or date for which, if duly made, it would fix or ascertain the said cash value of said demised premises as aforesaid, then unless all the parties interested can otherwise at once agree upon such value, any person or persons at the time interested upon either part or side hereto, shall have the right and be entitled to apply to any court of record in said county of Cook, to have the said value ascertained, whose judgment or decree in the premises shall be binding upon all persons concerned."

As to whether there had been by appellee a valid, determined and honest endeavor to have appraisers selected and an appraisement and award made in accordance with the terms of the lease, and as to whether, without any fault of appellee, such attempt had failed, so that it was necessary that an application should be made to a court of record to determine what would otherwise have been found by appraisers, we are of the opinion that no sufficient reason is shown for interfering with the conclusion of the court below in that regard.

It is insisted by appellant that a court of equity had no jurisdiction, and that appellee was, in violation of the constitution of this State, deprived of his right to a trial by

jury. As to this matter we are of the opinion that the decision of this court in the case of Tobey Furniture Company v. Rowe, 18 Ill. App. 293, is decisive of this case.

Appellant attempts to draw a distinction between that case and this, saying that in that case the provision for the payment of rent in the lease was to pay a sum equal to six per cent upon the appraised value of the lot, and that until there had been an appraised value no action at law could be maintained for the rent, whereas, as appellant insists in the present case the provision is to pay a sum equal to five per cent upon the cash value of the land, that a cash value is a value that always exists, and is an ever-subsisting fact, which in an action for the rent might be found by a jury; whereas an appraised value is something that does not exist until there has been an appraisal.

In considering this case and the case in the 18th Ill. App. we must not stick in the bark in our examination of either, or confine ourselves to a single clause selected from either.

The lease in the present case as well as that in the case of the Tobey Furniture Company, consists of many paragraphs, and each instrument as a whole is to be considered for the purpose of determining whether they are so similar or so variant that a decision upon one is or is not authority for the course to be pursued in respect to the other.

The lease considered in the case of the Tobey Furniture Company v. Rowe, contained the following provisions:

“2d. There shall be paid for each of the three remaining periods of five years of the said term of twenty years, a sum of money for each respective period, equal to six per cent per annum upon the appraised value of the said lot, piece or parcel of ground, upon an appraisal thereof to be made at the time and in the manner hereinafter provided, the payment thereof to be made at the times, and with such other payment as is hereinafter further provided.”

“4th. The question to be submitted to the said appraisers at the time of each appraisal shall be: ‘What, in your candid judgment, is the present fair cash value of the said demised premises, not taking into consideration the

improvements thereon?' And all reports of appraisers shall be made in writing.

"5th. Six per centum of the valuation of the said lot, piece or parcel of ground, exclusive of improvements thereon, thus found by the said appraisement, shall be the rent to be paid by the said parties of the second part for the premises for the next ensuing period of five years after such appraisement is made, to be paid, together with taxes, all according to the several provisions herein contained."

In the present case, the lease provides for the payment of five per cent upon the cash value of the premises to be determined by appraisement; the provision of the lease in the case at bar being as follows:

"During the residue of said term, that is to say, from and including the 1st day of January, A. D. 1892, until the first day of January, 1922, yielding and paying therefor yearly, the sum or yearly rent, which shall be equal to five per cent of the cash value of said demised premises, exclusive of the buildings and improvements thereon. * * * And it is further mutually agreed between the parties hereto, that in order to ascertain the said cash value as before specified, the person or persons then interested may select a competent and disinterested person" (here follows the provision for appraisement set out in the bill of complaint). * * *

"The said appraisers, or a majority of them, shall render their award in writing, subscribed by them or a majority of them, of the then cash value of said demised premises, exclusive of the buildings and improvements thereon. * * *

Which value, when so found, in a legal, just and valid manner, shall be assumed and taken to be the said cash value of said demised premises, as above specified, at the respective date for which said appraisers may have been chosen and selected."

The clear intent and purpose of each lease is that a rental is to be paid upon the cash value, and that such cash value is to be determined by appraisement. We think there is no substantial difference in the two leases in this regard.

In the present case it would seem as if the title, derived

from the lessee of the premises, was in such a state that the landlord, in order that he might be able to avail himself of the remedy provided by the lease, as well as that afforded by the statute for non-payment of rent, had a right to have the rent fixed by a court of equity.

Counsel for appellant have not made it clear that appellee could, in a suit at law, have recovered such a judgment as would have enabled him in all events either to have obtained the rent due him, or to have regained possession of his premises in a single suit at law. We entirely agree with appellant that a judgment in an action at law, based upon the cash value of the premises in such action found, for rent due under the terms of the lease, would have been *res adjudicata* as to the basis upon which rent was to be computed and paid, up to the time for the next appraisement. Freeman on Judgments, Sec. 273; Black on Judgments, Sec. 624.

The case was tried, witnesses appearing and testifying in open court, so that the court had a better opportunity for arriving at a conclusion as to the fact in dispute, viz., the cash value of the premises, than a reviewing court can have.

We perceive no such errors in the reception or rejection of evidence as warrant a reversal of this case.

It is urged that this case presents the novel feature of a court of equity sitting merely to find a single fact without giving any relief based upon such fact.

We see no reason why the Circuit Court, having obtained jurisdiction for the purpose of ascertaining and fixing the cash value of the premises as a basis upon which to compute rent, might not have gone to make a decree for the payment of all rent that upon such basis was, under the terms of the lease, due and payable up to the time of the filing of the bill in this case; nor do we see any reason why, because the court stopped short of awarding relief which it had power to give, it can be said that the court was thus ousted of jurisdiction to render any decree at all.

Doubtless if appellant had asked that it do so, the court

would have gone on and awarded a decree for the rent due upon the basis of the value by it found, up to the time of the bringing of the bill. If the court has, as is urged by appellant, only found and determined what is but the incident to that which gave it jurisdiction to proceed at all, its action in that regard was one of which appellant made no complaint in the court below, and has not urged as error here, other than in the way of insisting that the decree, as to the relief awarded, is so incomplete that it shows that the court had no jurisdiction of the subject-matter of the bill. The error, if any, in failing to award complete relief, is a thing of which we do not think appellant is now in a position to complain of.

The decree of the Circuit Court will therefore be affirmed.

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59 432

Warren J. Durham v. William Behrer et al.

1. ATTORNEY'S FEES—*In Foreclosure Proceedings*.—A person named in a trust deed as a successor in trust, is not thereby prohibited from acting as an attorney in foreclosure proceedings, and a decree allowing him the stipulated solicitor's fees is proper.

Memorandum.—Foreclosure proceedings. Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed July 2, 1894.

The opinion states the case.

W. J. DURHAM, *pro se*.

JULIUS STERN, attorney for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was a proceeding in chancery to foreclose a trust deed, which deed contained the following:

"Now, if default be made in the payment of the said promissory note, or of any part thereof, or the interest

Durham v. Behrer.

thereon, or any part thereof, at the time and in the manner above specified for the payment thereof, etc., etc., on the application of the legal holder of said promissory note, *
 * * in his own name or otherwise, to file a bill or bills in any court having jurisdiction thereof against the said party of the first part, his heirs, executors, administrators and assigns, to obtain a decree for the sale and conveyance for the whole or any part of said premises for the purpose herein specified, by said party of the second part, as said trustee or as special commissioner, or otherwise, under order of court, and out of the proceeds of any such sale to first pay the costs of such suit, all costs of advertising, sale and conveyance, including the reasonable fees and commissions of said party of the second part, or person who may be appointed to execute this trust, and one hundred dollars attorney's and solicitor's fees."

* * * * *

"In case of the death, resignation, removal from said Cook county, or other inability to act of said grantee, *
 * * then Julius Stern, of said county, is hereby appointed and made successor in trust herein, with like power and authority as is hereby vested in said grantee. It is agreed that said grantor shall pay all costs and attorney's fees incurred or paid by said grantee or the holder or holders of said note, in any suit in which either of them may be plaintiff or defendant, by reason of being a party to this trust deed, or a holder of said note, and that the same shall be a lien on said premises, and may be included in any decree ordering the sale of said premises and taken out of the proceeds of any sale thereof."

John C. Behrer filed the bill making appellant, William Behrer, as trustee, and Julius Stern, successor in trust, parties defendant. Julius Stern acted as complainant's solicitor. The court in its decree allowed the complainant a solicitor's fee of \$100. This is said to have been error.

The compensation allowed is not to Mr. Stern, as trustee, nor is it for any services rendered by him, as trustee; indeed he seems never to have rendered any such service, but to

have had at the most only a mere right of succession to what appears to have been a naked trust.

The case of Cheltenham Improvement Co. v. Whitehead, 128 Ill. 279, is decisive of this; see also Heffron v. Gage, N. E. Reporter, March 30, 1894, p. 569.

The making of Mr. Stern a party defendant, did not prevent his acting as solicitor for complainant, nor does it afford a reason why the complainant should not be allowed a solicitor's fee.

Mr. Stern had no duties to discharge or interests to defend; he was a mere nominal defendant.

The decree of the Superior Court is affirmed.

54 566
154 476

Caroline Stier v. Henry Harms.

1. VERDICT—*Instructions for Defendant.*—If there is no evidence fairly tending to support the action, it is not error to instruct the jury to find against the plaintiff.

Memorandum.—Trespass. Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANCOY, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed March 29, 1894.

H. S. MECARTNEY, attorney for appellant.

ELBERT H. GARY and PARKE E. SIMMONS, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant sued the appellee in trespass, and at the close of the evidence the court instructed the jury peremptorily to find against her. If there was no evidence fairly tending to support the action this was not error. *Milburn Wagon Co. v. Stevens*, 43 Ill. App. 508; *Purdy v. Hall*, 134 Ill. 298. Here the evidence was that the appellant resided in a certain house; the alleged trespasser, a son of the appellee, brought

Miller Grate Co. v. Hay.

to, and left at, the premises, a written demand signed by the appellee, addressed to the appellant and others, for immediate possession of the premises; that at the time of the alleged trespass, two wagons with lumber came to the premises accompanied by several men, one of whom, it was rather vaguely testified, worked for the appellee; that those men began digging and breaking the house; that the appellee came to the place, and one of the men said, "I don't want to get arrested so I am going away;" that the appellee talked with him, gave him some money, and the man began work again.

Without commenting upon this evidence, we only say that the inference to be drawn as to the connection of the appellee with the alleged trespass was for the jury. The judgment must be reversed and the cause remanded.

**The Miller Grate Company v. William Sherman Hay,
Assignee, etc., in the Matter of the Estate
of John W. Ayers, Insolvent.**

1. **SALES—Segregation of Goods.**—Looking at the goods, making a memorandum of them giving a description of what would be taken, is not a segregation of them sufficient to pass the title as against an assignment for the benefit of creditors.

Memorandum.—Assignment for the benefit of creditors. Intervening petition. Appeal from the County Court of Cook County; the Hon. FRANK SCALES, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 19, 1894.

The opinion states the case.

APPELLANT'S BRIEF, WAGNER & KENDIG, ATTORNEYS.

In a contract of sale the title passes, if such appears to be the intention of the parties; where the quantity was stated, the price fixed and the location specified and nothing remained to be done to put the purchaser in full possession except to pass over the warehouse receipts, the title passed

on the making of the contract. *Luthy v. Waterbury*, 140 Ill. 668; *Amos v. Sennott*, 4 Scam. 440; *Schneider v. Westerman*, 25 Ill. 517; *Raynolds v. McCormick*, 62 Ill. 412; *Stanley v. Robinson*, 14 Brad. 482.

APPELLEE'S BRIEF, WILLIAM H. LEE, ATTORNEY.

It is a fundamental principle pervading everywhere the doctrine of sales of chattels, that if goods be sold while mingled with others, by number, weight or measure, the sale is incomplete, and the title continues with the seller until the bargained property be separated or identified. The reason is that the sale can not be applied to any article until it is clearly designated, and its identity thus ascertained. *Benjamin on Sales* (Perkins' Ed.), Sec. 346; *Scudder v. Worster*, 11 Cush. 573; *Haldeman v. Duncan*, 51 Pa. St. 66; *Golder v. Ogden*, 15 Pa. St. 528.

Where specific goods to which the bargain is to attach, are not agreed on, it is clear the parties can only contemplate an executory agreement. *Benjamin on Sales*, Sec. 310.

And replevin will not lie. *Low v. Freeman*, 12 Ill. 467; *Uplike v. Henry*, 14 Ill. 378; *Haverstick v. Fergus*, 71 Ill. 105; *Stanley v. Robinson*, 14 Brad. 480.

They must be put in deliverable shape or the title will not pass. *Benjamin on Sales*, Sec. 318.

Where anything remains to be done under the contract, title does not pass until the contract is completed. *O'Keefe v. Kellogg*, 15 Ill. 352; *Frost v. Woodruff*, 54 Ill. 157; *Hoffman v. Culver*, 7 Brad. 450.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a final order of the County Court dismissing the petition of the Miller Grate Company.

The record in this case discloses that on August 1, 1893, John W. Ayers made a deed of voluntary assignment for the benefit of his creditors to William Sherman Hay, and that on September 7th the Miller Grate Co., appellant, filed an intervening petition in the matter of the insolvent estate,

Chicago Wharfing & Storage Co. v. Street.

claiming certain goods, and asking an order on the assignee to deliver them to appellant; to this petition the assignee filed an answer denying the right of petitioner to said goods; the Chicago Trust & Savings Bank also filed an answer claiming a title to the goods by reason of an execution and levy prior to the time of the assignment. Issue being joined the matter was tried before Judge Frank Scales without a jury. Testimony was heard on behalf of the appellant only, and, upon motion of the assignee, the petition was dismissed, to which exception was taken and an appeal allowed.

Appellant claimed to have purchased of, and had set apart certain goods by the insolvent.

It must be presumed, the general finding being for the assignee, that the County Court found that there was no such segregation of the goods bargained for, as passed the title thereto.

We have examined the testimony as to this matter, and we do not find evidence of any such setting apart of these goods, placing them so that it could be clearly seen that they were by themselves, not a part of a mass, as would justify a reversal of the order made in this case. Looking at the goods, making a memorandum of them, giving a description of what would be taken, would not be sufficient. Benjamin on Sales, Sec. 346.

The order of the County Court is affirmed.

Chicago Wharfing and Storage Company, a Corporation,
v. Charles A. Street et al.

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54	380
54	569
157	605
54	569
83	468

1. CONTRACTS—*Intent of the Parties in Construing.*—The intent of the parties is what the courts endeavor to arrive at in construing contracts. For this purpose a court will place itself in the shoes of the parties, that, viewing the subject-matter from their standpoint, it may be able to read the contract in the light under which it was consummated.

2. CONSTRUCTION—*Of Contracts—Conduct of the Parties.*—The subsequent conduct of the parties to a contract in respect to the matters concerning which it treats, will be looked into as affording evidence of the meaning which the contracting parties themselves attached to it.

8. *SAME—Understanding of an Adversary.*—Where the terms of an agreement are open to construction, a party may be held bound to the understanding which he knew his adversary had of the contract, but the rule does not apply, if the contract is in writing and its terms unmistakable.

Memorandum.—Bill to reform a contract. Error to the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1894. Reversed with directions. Opinion filed April 5, 1894.

STATEMENT OF THE CASE.

Plaintiff in error was the owner of certain dock property in Chicago, subject to a leasehold interest of Walter Shoemaker & Co., such leasehold beginning May 1, 1887, and ending April 30, 1892.

Shoemaker & Co. had placed on the property a large amount of planking for driveways and sorting platforms, and had erected fences, lumber sheds, and laid foundation timber for piling lumber. The lease to Shoemaker & Co. provided that, in case the lease should not be renewed, that the lessor should, at its expiration, purchase the planking on the premises, and pay therefor the valuation made by three appraisers.

Street, Chatfield & Co. negotiated for a lease of the premises for a term beginning May 1, 1892, and their attention was called to the provision in the Shoemaker lease requiring the lessor to purchase the planking, and the lease was shown to them.

The negotiations with Street, Chatfield & Co. were made on behalf of the company by Galloway, who is its treasurer, and on behalf of Street, Chatfield & Co., by Street.

Galloway stated to Street the provisions of the Shoemaker lease; that Street or the company should take the planking at the expiration of that lease at an appraised value, at the same time saying that he, Galloway, would lease the property to defendants in error for \$5,400 a year, providing defendants would take the planking as provided in the lease. Street, in answer to that proposition, said he would like to negotiate with Shoemaker for the lumber shed,

Chicago Wharfing & Storage Co. v. Street.

stable, fencing and some other things that they had on the ground, which were not included in the arbitration agreement, and that while he (Street) was negotiating for these he might make an arrangement to purchase the planking. Galloway said he had no objections to his buying the planking by private trade; that "he could either buy it or take it at the appraised value." Street said he would take the premises on the terms named. They then put their agreement into writing. The agreement as written contains the following clause: "The party of the second part (Street, Chatfield & Co.) shall be entitled to take the planking now on said ground, belonging to Walter Shoemaker & Co., at the appraised value, as provided in the lease between James B. Galloway and Walter Shoemaker & Co., or to purchase said planking direct from said Walter Shoemaker & Co., and at the expiration of the lease hereby agreed to be made, the first party agrees to purchase the planking on said yard of Street, Chatfield & Co., at its then appraised value, to be appraised as follows: "Each of the parties to said lease shall select one appraiser, and if these two can not agree, they shall select a third appraiser, and a majority of the three so chosen shall decide the value of said planking."

After this agreement was made, Street negotiated with Shoemaker & Co., and bought the lumber shed, fencing and other property on the premises, but they could not agree on the price for the planking. Street then requested an immediate appraisal. Appraisers were appointed, but the one selected by Galloway declined to act, and Street then said he would himself get a man who would be acceptable and would make a good appraiser. Street informed Galloway of the time set for the appraisal and requested him to be present. On April 7, 1892, Street introduced Galloway to Holtmeier, the appraiser selected by Street, and an appraisal was made the same day. The price placed on the planking was almost \$500 more than the amount for which it had been offered to Street by Shoemaker & Co. Galloway left while the appraisers were at work, but Street remained until an appraisal was made.

The next day Street called on Galloway, and said the appraisal was too high, but he was willing to pay the amount for which it had been offered to him. Shoemaker & Co. refused the offer.

Leases were drawn and tendered to Street, Chatfield & Co., in accordance with the agreement referred to, a provision being inserted that Street, Chatfield & Co. should pay the appraisal. They declined to sign the leases.

On May 1, 1892, Street, Chatfield & Co. took possession of the property and the planking and are using the same in their business. On May 2, 1892, they sent the complainant notice to remove the planking. The original bill of complaint was filed on May 13, 1892.

A second amended bill was filed, praying for a reformation of the contract and for specific performance.

Defendants answered, admitting all the material allegations of the bill, denying, however, that Street, Chatfield & Co. were bound to take the planking, and further that no mistake was made in the reduction of the agreement to writing.

A reference to a master in chancery was had, and testimony was taken. On the close of complainant's evidence, the master recommended the dismissal of the second amended bill for want of equity. And the court so ordered.

BRIEF OF PLAINTIFF IN ERROR, ADOLPH TRAUB, ATTORNEY.

If there is an error in the reduction of an agreement to writing, so that the written agreement fails, through some mistake of the draughtsman, or of the parties, to represent the real agreement of the parties, a court of equity will reform the agreement so as to make it express the real intention of the parties. Kerr on Fraud and Mistake, 418-419; Pomeroy's Eq. Jur., 11, Sec. 845; Bishop on Contracts, Sec. 707; Ball v. Storie, 1 Simons & Stuart, 210; Glass v. Hulbert, 102 Mass. 24; Green v. Railroad Co., 12 N. J. Eq. 166.

Mistake, within the meaning of equity and as the occasion of jurisdiction, is an erroneous mental condition, conception or conviction, induced by ignorance, misapprehension

Chicago Wharfing & Storage Co. v. Street.

or misunderstanding of the truth. Pomeroy's Eq. Jur., 11, Sec. 839; Bishop on Contracts, Sec. 465.

The mistake in the agreement in this case is one which equity will reform, whether it be called a mistake of law or of fact. Pomeroy's Eq. Jur. 11, Sec. 842, 845, 847; Brown's Parol Ev., Sec. 44 and p. 80; Am. & Eng. Ency. Law, XV, p. 643-644; White & Tudor's Leading Cases, Pt. 1, p. 985; Hunt v. Rousmanier, 8 Wheaton, 174; Bishop on Contracts, Sec. 465; Beardsley v. Knight, 10 Vt. 185; Kennard v. George, 44 N. H. 444; Bush v. Merriman, 87 Mich. 260; Stedwell v. Anderson, 31 Conn. 144; Remington v. Higgins, 54 Cal. 622.

Defendants are guilty of inequitable conduct in taking advantage of the mistake in the written contract. Greenleaf on Ev., 15th Ed. 111, Sec. 363; Pomeroy's Eq. Jur. 11, Sec. 847.

BRIEF OF DEFENDANTS IN ERROR, S. M. MILLARD, ATTORNEY.

The rule is well settled that a simple mistake of a party as to the legal effect of an agreement which he executed, or as to the legal result of an act which he performs, is no ground for either defensive or affirmative relief. If there were no elements of fraud, concealment, misrepresentation, undue influence, violation of confidence reposed, or other inequitable conduct in the transaction, the party who knew or had an opportunity to know the contents of an agreement or other instrument, can not defeat its performance or obtain its cancellation or reformation, because he mistook the legal meaning and effect of the whole or any of its provisions.

Where the parties with knowledge of the facts, and without any inequitable incidents, have made an agreement or other instrument as they intended it should be, and the writing expresses the transaction as it was understood and designed to be made, then the above rule uniformly applies; equity will not allow a defense or grant a reformation or rescission, although one of the parties—and as many cases hold, both of them—may have mistaken or misconceived its legal meaning, scope and effect. Pomeroy's Eq., Secs. 842, 843; also Note 1.

To this general rule exceptions exist, as, for instance, after making an agreement, if in the process of reducing it to writing a mistake is made by the scrivener, who fails to express what the parties agreed upon, or where the mistake is common to both parties, such as where they act under some misapprehension of the legal effect of the transaction, or where there is a misconduct on the part of one of the parties, or some other reason whereby an inequitable situation is created, arising from misunderstanding the facts or the intentions of the parties, equity has in many cases granted relief; but this exception is only allowed to interfere with the general rule where it clearly appears from the evidence in the case that some state of facts existed which misled the parties; but where the parties, knowing all the facts and familiar with the situation of all the circumstances, deliberately enter into an agreement, especially where the party complaining was learned in the law, as well as familiar with the facts, courts do not apply any exceptions to the general rule. *Pomeroy's Eq.*, Secs. 844, 845, 846 and 847; *Arter v. Cairo Democrat Co.*, 72 Ill. 434; *Broadwell v. Broadwell*, 1 Gilm. 599; *Beebe v. Swartwout*, 3 Gilman, 162; *Coffing v. Taylor*, 16 Ill. 456; *Ruffner v. McConnell*, 17 Ill. 212; *Wood v. Price*, 46 Ill. 439; *Goltra v. Sanasack*, 53 Ill. 456; *Bonney v. Stoughton*, 122 Ill. 536; *Stodalka v. Novotny*, 144 Ill. 125; *Crum v. Sawyer*, 132 Ill. 457.

The strongest and most convincing evidence will be required before the common law rule is postponed and the power of the court exercised. *Hunter v. Bilyeu*, 30 Ill. 228.

Charges of fraud must be clear and specific. *City of St. Louis v. Millard*, 14 Brad. 432; *Hamlon v. Sullivant*, 11 Brad. 432; *Emery v. Mohler*, 69 Ill. 222; *Sutherland v. Sutherland*, 69 Ill. 482; *Dinwiddie v. Self*, 145 Ill. 291; *Hunter v. Rousmaniere*, Adm., 1 Pet. 1.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The only matter in dispute in this case is whether the defendants are bound to take and pay the appraised value

Chicago Wharfing & Storage Co. v. Street.

of the planking, or may decline to take the planking at all. The intent of the parties is the thing at which courts endeavor to arrive in construing contracts. For this purpose the court will place itself in the shoes of the parties, that, viewing the subject-matter from their standpoint, it may read the contract in the light under which it was written. 2 Kent, 555; Boskowitz v. Baker, 74 Ill. 264; Doyle v. Teas, 4 Scam. 202-256; Walker v. Douglas, 70 Ill. 445-448.

The whole instrument is to be viewed and compared in all its parts, so that every part of it may be made consistent and effectual. 2 Kent's Com. 555.

Qui haeret in litera haeret in cortice—he who considers only the letter sticks in the bark—is a maxim which should not be forgotten in the consideration of the instrument signed by these parties.

The subsequent conduct of the parties under the contract in respect to the matters concerning which are its stipulations, will be looked to as affording evidence of the meaning which the contracting parties attached to the instrument they made. Chicago v. Shelden, 9 Wallace, 50-54; Coleman v. Grubb, 23 Penn. St. 393-409; Jackson v. Perrine et ux., 35 N. J. L. 137; Stone v. Clark, 1 Met. 378; St. Louis Gas L. Co. v. The City, 46 Mo. 121; Seavers v. Cleary, 75 Ill. 349; Wilson v. Marlow, 66 Ill. 385.

Illumining the agreement by these well known rules of construction, and it is manifest that the defendants understood that they had agreed to do one of two things, viz., to take the planking then on the ground, belonging to Walter Shoemaker & Co. at the appraised value as provided in the lease between Galloway and Shoemaker & Co., or to purchase said planking direct from said Shoemaker & Co. Defendants not being able to agree with Shoemaker & Co. as to the price to be paid for the planking, requested an appraisal of the same. In accordance with such request an appraisement was had, one of the appraisers being selected by defendants.

The defendant attended throughout the appraisal, but when it was declared and was found to be \$500 more than

the price for which Shoemaker & Co. had offered to sell the planking, defendants then declined to pay the sum so fixed, but offered to give the price at which, before the appraisal, Shoemaker & Co. had offered to sell. Shoemaker & Co., very naturally, refused to take less than the amount of the appraisal.

Defendants, by requesting an appraisal, selecting an appraiser and attending when the appraisal was being made, clearly indicated their understanding that having failed to agree with Shoemaker & Co., they, defendants, were to take the planking at the price that should be fixed by appraisal.

Their conduct in this regard was meaningless, not to say absurd, if the result of such appraisal was to them a matter of no consequence, a thing by which they were in no wise bound. There can be no doubt that if the appraisers had found the value of the planking to be \$500 less than the sum for which Shoemaker & Co. had offered to sell, defendants would have insisted upon their rights to take the same at the appraisal.

Defendants well knew how plaintiff understood the agreement; they had heard Galloway state the terms upon which he would make a lease, and while they may not directly have stated that they assented thereto, they had expressed no dissent, and proceeded to sign an agreement drawn up by Galloway after making such statement, in which Galloway told them that he would lease the property to defendants for \$5,400 a year, providing defendants would take the property as provided in the lease to Shoemaker & Co. The agreement thereafter signed provided for a lease at \$5,400 a year, and contained the stipulation as to the planking hereinbefore mentioned.

Where the terms of an agreement are open to construction, a party may be held bound to the understanding which he knew his adversary had of the contract. *Wells v. Carpenter*, 65 Ill. 447; 2 Kent's Com., 557.

If the terms of the writing signed by the parties were unmistakable, the foregoing rule of construction would not be applicable; but the agreement viewed from the stand-

point of the parties is not, as is contended by defendants, clearly to the effect that they were under no obligation to take the planking upon any terms. It is not denied that the agreement shows that when it was made plaintiff was bound to purchase the planking, then on the premises, at a value to be fixed by appraisement; that defendants, the lessees, were to pay taxes upon the improvements; that plaintiff at the expiration of defendants' lease should purchase from them the planking on the premises at its then appraised value.

Looking at the written agreement alone, it may be said to be uncertain whether defendants were bound to take the planking under one of two ways for fixing its price, or might decline to take it at all. Regarding the contract from the standpoint of the parties and their subsequent conduct, we have no doubt as to its meaning.

By the agreement of the parties, the defendants became bound when the appraisal had been had to discharge the obligation of plaintiff, Shoemaker & Co., in respect to the planking.

As between plaintiff and defendants as to the obligation to pay Shoemaker & Co., the defendants were their principals, and plaintiff surety; plaintiff could therefore maintain a bill to compel the defendants to discharge their obligation to Shoemaker & Co. Brandt on Guaranty and Suretyship, Sec. 223; Moore v. Topliff, 107 Ill. 241.

We do not think it necessary that any reformation of the instrument signed by the parties be made; plaintiff in error is entitled to relief upon the case it has made. The decree of the Circuit Court will be reversed, with directions to enter a decree directing the defendants to pay into court the appraised value of the planking as found by the appraisers, with interest thereon at five per cent per annum from May 1, 1892, and to execute a lease of said premises in accordance with the instrument signed by the parties, bearing date February 2, 1892, the same to be prepared and executed by the plaintiff.

If plaintiff in error shall present to the Circuit Court sat-

isfactory evidence that it has discharged its obligation to Shoemaker & Co. in respect to said planking, plaintiff will then be entitled to the money, to be paid into court on account thereof by defendants in error. Reversed with directions.

Richard Clark and William Loveday v. Stephen Liston.

1. MASTER AND SERVANT—*Duties of Master Do Not Apply to Tearing Down Buildings.*—In the destruction of a building there is no attempt or obligation to make it secure; the work of removal is one in which in turn each part of the structure is rendered insecure; this every workman understands and must be governed accordingly.

2. SAME—*Demolition of Buildings.*—A person engaged in the demolition of a building, is not bound to furnish his workman a safe place in which to work, but is under an obligation not to send him into a place known to be dangerous.

Memorandum.—Action for personal injuries. Error to the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed April 5, 1894.

The opinion states the case.

WALKER & EDDY, attorneys for plaintiffs in error.

ANDREW J. HIRSCHL and DAVID J. WILE, attorneys for defendant in error.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The defendant in error was employed by the plaintiffs in error to work in tearing down a large four-story brick and stone building in Chicago. The work of destruction began at the roof and progressed downward. The defendant in error, Liston, had been engaged upon this work for some twenty days. Upon the morning he was injured he was put to work at removing lath. At this task he was on the

54	578
62	623
54	578
72	81
54	578
88	477
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93	1286
54	578
97	1631
54	578
101	*404
101	*498

second floor, the stones above having been removed. Stepping along on the edge of the joists he approached a space where had been a stairway. It appears that in removing the stairway at this point, the support at one end of one or more of the joists of the floor had been removed, and as Liston stepped on one of these joists, it tipped up and he fell into the cellar beneath, breaking his leg.

The declaration in this case proceeds upon the theory that it was the duty of his employers to have had the joists upon which it was necessary he should walk, so fastened that he would be safe in doing the work he was employed to do; that the joists were improperly secured, of which his employers had knowledge and he was ignorant, and in consequence thereof he fell and was injured.

It is manifest that in the destruction of a building, there is not an attempt or obligation to make it or any part thereof secure; on the contrary the work of removal is one in which, in turn, each part of the structure is rendered insecure; this every workman understands.

Plaintiffs in error were not bound to furnish Liston a safe place in which to work; while they were under an obligation not to send him into a place they knew to be dangerous, and he could not by the use of ordinary care perceive to be so, it was also their duty, not, without notice to him, to so change the place where they put him at work, as to make such place more insecure.

The first instruction given for the plaintiff below, while entirely proper in some cases, is hardly applicable either under the declaration or facts of this case; for the reason that in the work being done there was no thought in the mind of any one that reasonably safe places for the performing of work were to be provided and maintained. Unless it be scaffolding or ladders, no places for the performance of such work are provided or maintained; neither walls nor floors are provided or to be maintained; they are in existence, as is a forest, and are to be cut or torn down.

The evidence is not that the joists upon which Liston stepped had been rendered insecure after he was put at

work removing lath; so far as appears, the support of the joist was the same the morning when he went to work that it was when he fell, and it seems that by the exercise of ordinary care he would have ascertained the lack of support which occasioned his fall.

As the case must be reversed and a new trial awarded, we refrain from further comment upon the evidence. Reversed and remanded.

Gregory T. Van Meter, as Receiver of the Estate of Eli G. Runals (now deceased) and George F. Harding, Jr., as Administrator of the Estate of Eli G. Runals, Deceased, v. Horace H. Thomas, Isaac Simmons, Alice M. Kirby, Joseph Sherwin, William Hansbrough, Cecelia Reid, Annie M. Reid, Joseph J. Reid, Emanuel Sandheimer and W. Beach Taylor.

1. **CHANCERY PRACTICE—No Presumptions in Favor of Decrees.**—In chancery there are no presumptions in favor of the decree of the court below. The Appellate Court is supposed to have before it all that the court below had, except that where the decree recites the facts found, such recital will be presumed, in the absence of a certificate, to have been based upon sufficient evidence.

2. **SAME—Decree of Foreclosure Not Assignable.**—A decree of foreclosure can not be assigned so as to substitute the assignee to all the rights of the complainant in the foreclosure suit. The remedy of the assignee in such a case is by a bill to carry into execution the first decree.

MR. JUSTICE WATERMAN dissents.

Memorandum.—Foreclosure proceedings. Error to the Circuit Court of Cook County; the Hon. LORIN C. COLLINS, Judge, presiding. Heard in this court at the March term, 1894, and reversed. Opinion filed April 19, 1894.

The opinion states the case.

WM. J. AMMEN, attorney for plaintiffs in error.

Van Meter v. Thomas.

ALEXANDER S. BRADLEY, attorney for Horace H. Thomas and W. Beach Taylor, two of the defendants in error.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

May 1, 1875, Eli G. Runals filed this bill against Isaac Simmons et al., to foreclose a mortgage. March 1, 1876, a decree of foreclosure was entered, but stood unexecuted.

March 23, 1888, some papers were filed in the cause which, if genuine, of which there is no proof in the record, assigned the decree to W. B. Taylor.

The next day, without notice to, or appearance by anybody but the moving party, so far as the record shows, an order was entered as follows:

“ ELI G. RUNALS vs. ISAAC SIMMONS ET AL.	}	Bill. In this cause, on motion of H. H. Thomas and A. S. Bradley, solicitors for W. Beach Taylor, it appearing to the court, from the records remaining therein, that the decree of foreclosure in said case, entered March 1, 1876, directs, among other things, that one of the masters in chancery of this court do sell the mortgaged premises described in said decree, before the northwest door of the building now (then) occupied by this court as a court house, situated on the southeast corner of Adams and La Salle streets, in the city of Chicago, in said county, it is ordered by the court that Horatio L. Wait, one of the masters in chancery of this court, do sell said premises before the east main entrance on Clark street, of the building now occupied by this court as a court house, in accordance with law and the approval of said master; and it further appearing to the court that said W. Beach Taylor is the owner of all the right, title and interest in said decree of foreclosure and the subject-matter of said suit, by assignments duly filed in this court and entered in the records thereof, from complainant in this suit and Emanuel Sandheimer, who are declared in said decree to be entitled to the money arising from such sale; it is further ordered that said W. Beach Taylor be and he hereby is substituted to all the rights of said complainant and said Sandheimer
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under said decree, and said master shall pay to said Taylor the proceeds arising from said sale, after deducting therefrom the costs of court and expenses of said sale."

In chancery there are no presumptions in favor of the decree below. This court is supposed to have before it all that the court below had, except that where the decree recites the facts found, such recital will be presumed, in the absence of a certificate, to have been based upon sufficient evidence. *Frink v. Neal*, 37 Ill. App. 621; *Flagg v. Stowe*, 85 Ill. 164; *Baird v. Bowers*, 131 Ill. 66.

Even with notice to all parties in the case, the method adopted by Taylor to get into the suit is without precedent; the course open to him was a bill to carry into execution the first decree. *Dan. Chy.*, 1585.

And even on such a bill, and all parties summoned, a decree reciting, not facts, but only conclusions as to ownership, with no proof of genuineness of alleged documents, would not stand. *Baird v. Powers*, 131 Ill. 66.

This writ of error is prosecuted by Van Meter, as receiver, under a creditor's bill against Runals. He has no business meddling in matters in which he has no interest. See my separate opinion on rehearing in *Gilbert v. Black*, No. 5030. But the other plaintiff in error, George F. Harding, Jr., administrator of Runals, is *prima facie* entitled to the money obtainable under the foreclosure decree, and therefore may bring error to reverse a decree intended to deprive him of it. *Bacon Abr.*, Error, B.

No objection having been made on a misjoinder, we regard it as waived.

The litigation between Kirby and Taylor, as shown by *Kirby v. Runals et al.*, 37 Ill. App. 186, and 140 Ill. 289, is *res inter alios*, and if it could affect the writ of error, should have been pleaded.

The order and decree of March 24, 1888, is reversed at the cost of Taylor, but there is nothing to remand, as he is no party to the case below.

WATERMAN, J., dissents.

Willard v. Rogers.

**Elisha W. Willard v. John G. Rogers, as Assignee of
the World's Fair Encampment, Insolvent.**

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1. **LEASE—Covenants Attach to Assigns.**—A person took to himself a lease of premises, for the purpose of erecting buildings thereon, containing covenants by which the rent to accrue was made a lien upon buildings and improvements that might be placed upon the premises, to yield possession at the end of the term “in as good condition as when entered upon,” and also “not to remove any buildings or other improvements from said premises *before the expiration of the lease*, without written consent of” the lessor, organized a corporation which erected a hotel upon the leased premises. It was held that the covenants of the lease applied to the corporation, and to the extent of its right in the premises attached to the buildings thereon.

2. **LANDLORD AND TENANT—Persons Holding by License of the Tenant—Subject to the Landlord's Rights.**—A tenant can not grant a privilege to erect buildings not subject to the lien for rent, which he could not himself exercise.

Memorandum.—Assignment for the benefit of creditors. Appeal from the County Court of Cook County; the Hon. FRANK SCALES, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded with directions. Opinion filed April 19, 1894.

The opinion states the case.

GEO. WILLARD and L. & P. TRUMBULL, attorneys for appellant.

W. R. BURLEIGH, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

November 11, 1892, the appellant demised to Edward C. Kemble some twelve acres of ground for the period of eleven months, “to be used for the lodging and boarding of visitors to the World's Fair, and all purposes incident to such boarding and lodging of visitors.”

The lease contained on the part of the lessee, a long covenant in the same words as appear on pages 175 and 176 of *Webster v. Nichols*, 104 Ill. 160, by which the rent to accrue was made a lien upon buildings and improvements that

might be placed upon the premises. Also a covenant to yield possession at the end of the term "in as good condition as when the same were entered upon," and also "not to remove any buildings or other improvements from said premises *before the expiration of this lease*, without written consent of" the lessor. The italicized words are interlined in the printed blank used.

Soon afterward the "World's Fair Encampment" was incorporated. Kemble was a promoter of the corporation, took nearly nine-tenths of the stock—was its secretary and treasurer—and he and one other stockholder, holding one-tenth of the stock, were practically sole managers of its affairs.

The lease was taken by Kemble for the benefit of the corporation, which proceeded to erect the "Hotel Fraternity" upon the premises at an expense of \$55,000.

On the third day of July, 1893, both Kemble and the corporation made assignments for the benefit of their creditors, and the appellee is administering their respective assets under the direction of the County Court. Upwards of \$6,000 of rent unpaid is due to the appellant.

It is not necessary to go into detail as to various petitions which have been filed in the County Court.

October 14, 1893, by the consent of all parties in interest, a decree was entered in the County Court, providing for the payment of the appellant by the appellee, which was never complied with for lack of funds, which decree closed with the sentence:

"And it is further ordered and decreed that upon such payment the lien of said Elisha W. Willard upon said hotel and appurtenances shall cease and determine, and at the expiration of the term of said lease from said Willard to said Kemble said hotel may be sold or removed by said assignee."

That decree was entered upon a petition of the appellee, which contained an allegation that the lease was taken by Kemble for the benefit of the corporation, and the consent decree having been entered upon that petition, the appellee can not now question the truth of the allegation; and considering all the circumstances, its truth is apparent.

Willard v. Rogers.

We assume as both parties assume, that under the lease, the tenant may remove the buildings and improvements. May the appellee remove them without paying the rent, or rather may he sell them to a purchaser who may remove them, and the proceeds be applied by the appellee to the payment of debts, without preference to the appellant, is the question between the parties. The record shows many transactions, in some of which other parties were concerned, which I have not recited, but the respective rights of these parties depend upon the facts stated.

The building, being erected by the corporation, which had no estate in the land, must be considered as being erected under a license from Kemble. He could not grant a privilege to erect buildings not subject to the lien for rent, which he could not himself exercise. *Ogden v. Stock*, 35 Ill. 527.

And even if it was to be conjectured that the corporation had an under lease of some sort from Kemble, still the lien would attach, as the corporation, to the extent of its right in the premises, would be an assign. *Ball v. Chadwick*, 46 Ill. 28.

On the final hearing the County Court entered a decree, two sentences of which are: "The court doth therefore order, adjudge and decree that the prayer of the cross-petitioner, Elisha W. Willard, for a lien on the property mentioned in said petition, or any property of said insolvent, or for a priority or preference to be paid him out of the money arising from said sale for the amount due him for the rent of said premises, or for the right to bid at the sale of said property, and have said bid, if accepted, credited on account of the rent thereof, be and the same are hereby denied.

It is further ordered, adjudged and decreed that said John G. Rogers, assignee, be and he is hereby authorized and directed to advertise for the period of three weeks for the sale of said Hotel Fraternity, together with the appurtenances, including all water pipes, water closets, bath tubs, fixtures and connections, and the steam engine, boiler, pipes, fixtures, burners and connections, at public auction, to the highest bidder, for cash."

So much of that decree as directs a sale is affirmed, ~~but~~ the part denying relief to the appellant ~~is reversed~~.

This case is not, in principle, distinguishable from Webster v. Nichols, 104 Ill. 160. That case is cited in First Nat. Bk. v. Adam, 138 Ill. 483, with apparent approval, and must be held to govern this.

As to any lien upon chattels not attached to the realty, while it is faintly claimed by the appellant, there is so little ground for it, that it is enough to say that none exists. Liens upon crops under agricultural leases are foreign to this discussion.

As before said, so much of the decree as directs a sale is affirmed; that part of the decree which denied relief to the appellant, as well as the findings of the court that he is not entitled to a lien, or priority of payment, or preference, is reversed, and the cause remanded with directions to award him the relief so denied.

The costs are to be paid by the appellee in due course of administration of the assets of the World's Fair Encampment.

**Leslie R. Harsha v. Albert Babicx, by His Next Friend,
Joseph Babicx.**

1. INSTRUCTIONS—*A Master as Insurer for Absolute Safety.*—In an action for personal injuries, the contest being over the construction of a pulley, it is proper to instruct the jury that the defendant is not bound as an insurer for the absolute safety and suitability of the machinery and appliances furnished by him for use in his business. He is not bound to furnish the very best or most approved kind of machinery to be used in his factory. It is sufficient if the machine and the pulleys and appliances connected with the same are reasonably safe and suitable for the purpose for which they were used.

MR. JUSTICE SHEPARD, dissenting.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed April 19, 1894.

The opinion states the case.

Harsha v. Babick.

MEEK & TROWBRIDGE, attorneys for appellant.

GIBBONS, KAVANAGH & O'DONNELL, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action to recover damages sustained by the plaintiff, a minor, over fourteen years of age, from certain machinery operated by the defendant, the plaintiff being at the time in the appellant's employment.

Evidence was introduced tending to show that a certain pulley was defective or out of order, and that in consequence thereof the plaintiff was injured.

The defendant denied that the pulley was defective or out of order.

Under these circumstances the defendant asked for the following instruction:

"The jury are instructed that the defendant was not bound as an insurer for the absolute safety and suitability of the machinery and appliances furnished by him for use in his business, and that he was not bound to furnish the very best or most improved kind of machinery to be used in his factory. It was sufficient if the machine and the pulleys and appliances connected with the same were reasonably safe and suitable for the purpose for which they were used."

This the court refused to give, but in its stead gave the following:

"The jury are instructed that the defendant was not bound, as an insurer, for the absolute safety and suitability of the machinery and appliances furnished by him for use in his business, and that he was not bound to furnish the very best or most approved kind of machinery to be used in his factory. It was sufficient to prevent a recovery in this case if the machine and pulleys and appliances connected with the same were reasonably safe and suitable for the purpose for which they were used, if you believe that is shown by a preponderance of the evidence, and you should also

believe from the evidence that the plaintiff was sufficiently instructed by the defendant's foreman so as to enable the plaintiff to avoid danger from the machinery, if you believe from the evidence said machinery was dangerous, and the injury complained of was caused by reason of plaintiff's disregard of such instruction."

The instruction for which the defendant asked should have been given. Nothing equivalent thereto was given, and for the error in this regard the judgment must be reversed and the cause remanded.

MR. JUSTICE SHEPARD dissents.

David J. Reilly v. D. H. Tolman, C. L. Brown, The Chicago Trust and Savings Bank and The Midland Company.

1. **USURY—No Remedy in Equity.**—Where a promissory note is alleged to be usurious and past due, an injunction will not lie to restrain its collection, as the defense can be made at law.

2. **INJUNCTIONS—Party Obtaining Must be Ready at all Times to Defend.**—When a party obtains a temporary injunction, he is bound to be ready at all times to appear and maintain the same. The party enjoined has a right at any time to take steps to relieve himself from the restraining order. The party obtaining the injunction can not, by his failure to appear, delay a hearing asked for by a party enjoined.

Memorandum.—Bill for injunction. Error to the Circuit Court of Cook County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the March term, 1894, and decree modified. Opinion filed March 29, 1894.

The opinion states the case.

C. E. CRUIKSHANK, FRED H. ATWOOD and H. C. BENNETT,
attorneys for plaintiff in error.

BRIEF OF DEFENDANTS IN ERROR, JOHN G. HENDERSON,
ATTORNEY.

The defense of usury is a legal remedy and was purely such under the facts and circumstances as shown by the face

Reilly v. Tolman.

of the bill, and a party can not ignore this fact and invoke the aid of equity. He can have no footing in equity where he has an adequate remedy or defense in an action at law. *Winkler v. Winkler*, 40 Ill. 179; *Wangelin v. Goe*, 50 Ill. 459; *Long v. Barker*, 85 Ill. 431; *Beauchamp v. Putnam*, 34 Ill. 378; *Yates v. Batavia*, 79 Ill. 500; *Finlay v. Thayer*, 42 Ill. 350; *Goodell v. Lassen*, 69 Ill. 145; *Dunham v. Miller*, 75 Ill. 379; *Coughron v. Swift*, 18 Ill. 414; *Gore v. Kramer*, 117 Ill. 176; *Cook County v. Davis*, 143 Ill. 151; *Buzzard v. Houston*, 119 U. S. 347; *Russell v. Clarke*, 7 Cranch, 69; *Taylor v. Turner*, 87 Ill. 296; *Victor Scale Co. v. Shertleff*, 81 Ill. 313.

An injunction will not be granted where every matter stated in the bill can be made as fully available in answer and defense to an action at law, as by an appeal to equity. *Vennum v. Davis*, 35 Ill. 568; *Beauchamp v. Putnam*, 34 Ill. 378.

A court of equity will not exercise jurisdiction in any case to stay proceedings, where the court of law can do as full justice to the subject in dispute, as can be done in a court of equity. *Palmer v. Gardner*, 77 Ill. 143.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellant filed in the Circuit Court his bill alleging the borrowing by him from D. H. Tolman, one of the appellees, of the sum of \$1,250, and that he, appellant, gave his judgment note therefor for the sum of \$1,500; that the said note has been frequently renewed, and said Tolman now has appellant's past due note so given for the sum of \$1,500 although appellant has made payments of usurious interest and other payments on account of said loan, to more than the entire amount thereof, viz., has paid altogether upon said loan, the sum of \$1,987.50, being much more than the principal and lawful interest upon the sum borrowed amounts to. Appellant also alleges a certain purchase by him from said Tolman of stock in a certain corporation, the arrangement for said purchase being, it is charged, but a device to enable said Tolman to obtain usurious interest.

Appellant obtained an injunction restraining appellees from assigning or transferring the note made by appellant. To the bill a demurrer was filed, the same being called up for hearing. Appellant not appearing, the demurrer was sustained, and the bill dismissed for want of equity.

Appellant at the same term appeared and asked the court to set aside the order of dismissal. This the court refused to do.

The bill shows no ground for the interposition of a court of equity. Appellant can make whatever defense he has to the note, in a suit at law, if one shall be brought. The note being past due, any assignee thereof will take the same subject to appellant's rights.

When a party obtains a temporary injunction, he is bound to be at all times ready to appear and maintain his right to the same. The party enjoined has a right at any time to take steps to relieve himself from the restraining order, and the complainant can not, by a failure to appear, delay a hearing asked for by a party enjoined.

As the decree dismissing for want of equity might operate to the prejudice of appellant in a suit at law, the order of dismissal will be modified by making the decree of dismissal without prejudice. Appellee will recover his costs in this court.

Decree modified so that dismissal of bill be without prejudice.

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**Florence N. Cook, Administratrix of the Estate of
Charles M. Cook, Deceased, and Charles F.
Cook, a Minor, v. Hosea P. Meyers,
Administrator of the Estate
of John Hasset, Deceased.**

1. PRACTICE IN CHANCERY--*Exceptions to Master's Report.*—Exceptions to a master's report are always to be confined to such objections as were allowed or overruled by the master.

Memorandum.—Bill for foreclosure. Error to the Circuit Court of

Cook v. Meyers.

Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed March 9, 1894.

D. M. KIRTON, attorney and guardian *ad litem* for plaintiffs in error.

P. T. KEILY, attorney for defendant in error.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The plaintiffs in error are the widow as well as administratrix of Charles M. Cook, deceased, and their minor son.

The defendant in error is the administrator of John Hasset, deceased.

In a foreclosure suit a decree was entered in favor of the defendant in error and against the plaintiff in error upon a mortgage, securing some notes, dated June 25, 1888. The defense was an attack upon the consideration of the notes, and upon the capacity of Charles M. Cook to do business at the time the mortgage was executed, on account of excessive indulgence in drink.

These were questions of fact upon which we should agree with the finding of the master, approved by the court, if they were properly before us, but they are not.

All the objections filed before the master to his report are merely variations in language of the first: "Said report and finding is contrary to the evidence." Such an objection is too general and pointless to raise any question. *Waska v. Glaisner*, 43 Ill. App. 611; *Snell v. Deland*, 138 Ill. 55.

The exceptions to the master's report "are always to be confined to such objections as were allowed or overruled by the master." *Hurd v. Goodrich*, 59 Ill. 450.

It is not, therefore, regular to consider the expanded exceptions filed before the court.

The decree must be affirmed.

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153 143**George W. Heathman v. John G. Rogers, Assignee, etc.**

1. **EQUITY—A Rule of Proceeding.**—Equity treats that as done which in good conscience ought to be done; but in the consideration of what ought to be done, it has regard not merely to the rights of the persons between whom it has been agreed that a thing should be done, but also of others entitled to be heard, and whose interests have been affected by the conduct of the parties to the agreement.

2. **SECRET LIENS—Not Favored.**—An unrecorded mortgage is a secret lien, and not favored in law or equity.

3. **ASSIGNMENT FOR THE BENEFIT OF CREDITORS.**—*When a Mortgage is a part of.*—A chattel mortgage was taken, it being agreed that it should not be recorded unless the mortgagor (a corporation) was about to fail. Subsequently, it being in the possession of the mortgagor, it was again acknowledged, before a different justice, and recorded half an hour before the filing of an assignment by the mortgagor. Having been delivered and recorded after the mortgagor determined to make a general assignment, and such delivery having been made at the insistence of the mortgagee's agent, who was a director of the mortgagor, the mortgage was held to be a part of the assignment and subject to it.

4. **INSOLVENT CORPORATIONS.**—When a corporation becomes insolvent, its directors become trustees for its creditors, and incapable of acting as agents for any other creditor, so as to enable him to obtain a preference.

Memorandum.—Petition for a lien under the general assignment act. Appeal from the County Court of Cook County; the Hon. FRANK SCALES, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed March 29, 1894.

STATEMENT OF THE CASE.

This case arises upon a petition filed by the appellant in the County Court, claiming a lien to the amount of \$5,487.85 upon 350 sets of bed-room furniture in the possession of appellee as assignee of the World's Fair Encampment, under an assignment for the benefit of creditors, made by that company July 3, 1893.

The World's Fair Encampment is a corporation organized under the laws of Illinois. It constructed a building, and the bed-room sets in controversy constituted a part of the furniture purchased to equip such hotel.

The appellant was induced to guarantee the notes of the

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Encampment, payable to the order of the furniture companies, for the amount of the purchase price of the furniture, upon the agreement that he be given a chattel mortgage thereon to secure him upon his indorsement and guaranty. The mortgage does not appear to have been executed at the time appellant signed the notes. It was, however, shortly after drawn up and signed by the treasurer of the Encampment, under date of the 11th of May, 1893. It was acknowledged before a justice of the peace, June 5, 1893, it being agreed that it should not be recorded unless the mortgagor was about to fail. Subsequently, and on the 3d of July, 1893, it being in the possession of the mortgagor, it was again acknowledged by the treasurer before another justice, and was then duly recorded half an hour before the filing of the assignment by the Encampment. This was done after an assignment had been determined upon, and upon the insistence of the son of appellant, who had been directed by appellant to look after the matter for him. This son was a director of the Encampment Company.

Appellant, by reason of the collapse of the Encampment, was obliged to pay its notes, guaranteed by him as aforesaid, to the amount of \$4,333.90, and thereupon filed the present petition in the County Court, asking the delivery to him of the furniture in controversy under his lien. The County Court, upon a hearing, having dismissed the petition, the appellant perfected the present appeal.

GREEN, WILLITS & ROBBINS, attorneys for appellant.

WM. R. BURLEIGH, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It is insisted that the agreement, upon sufficient consideration to give appellant a mortgage, created in his favor an equitable lien.

It is true that equity regards and treats that as done which in good conscience ought to be done; but a court of

equity, in the consideration of what ought to be done, has regarded not merely the rights of the persons between whom it has been agreed that a thing should be done, but also others entitled to be heard, whose interests have been affected by the conduct of the parties to such agreement. *Clements v. Moore*, 6 Wallace, 299-312; *Harvey, assignee, v. Crane*, 2 Bissell, 496; *National Park Bank v. Whitmore*, 40 Hun, 499.

In the present case it appears, not that a mortgage was executed, but promised; and that the understanding had with appellant was that the promised mortgage was not to be recorded, unless the mortgagor was about to fail. In other words, the promised lien was to be kept secret.

If, as is contended, appellant had an equitable lien, by his conduct in concealing such lien, a fictitious credit was given to the mortgagor, and appellant is now confronted by the claims of those who have trusted his debtor in ignorance of what he now insists is a security he had long before the failure of the Encampment Company.

Secret liens are never favored.

It is said that under the insolvency statute of this State, an assignee takes only the estate which the assignor had, and that the estate of the assignor was subject to the right of appellant to have a mortgage thereon to an equitable lien.

Whatever may have been the rights of appellant as against the Encampment Company, that company could have sold its property and given a good title thereto, or it could have suffered judgment, and thereby enabled another creditor to obtain a lien having precedence over that of appellant; or it could, as it did, determine upon a general assignment without reference to the rights of appellant. The mortgage being still in the keeping of the mortgagor, appellant had, when such determination was made, no security; he had merely a promise of security. What he is now seeking to enforce is such promise. The promise was to give a chattel mortgage which should not be recorded unless the company was about to fail, of which anticipated

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failure appellant should have notice. Such an undertaking is obnoxious to the spirit of our insolvency law, and can not be enforced.

Having been delivered to appellant and by him recorded after the company had determined to make a general assignment, and such delivery having only been made at the insistence of appellant's agent, who was a director of the company, the mortgage is to be regarded as a part of the assignment and subject to it. *Preston et al. v. Spaulding et al.*, 120 Ill. 208; *Hanford Oil Co. et al. v. First Nat'l Bank*, 126 Ill. 584.

In the last mentioned case the court said: "If instead of executing the power of attorney with the agreement mentioned, the debtor should execute a chattel mortgage to his creditor, with an agreement that it should not be placed of record until financial trouble came, of which notice should be given by the debtor, and the debtor, after determining to assign for the benefit of all his creditors, should give the notice, and the chattel mortgage be filed for record, could it be contended that such mortgage would have a better standing than, or priority over, another mortgage executed and recorded contemporaneously with the first mentioned mortgage? Obviously not. Yet it will be conceded that the mortgage last mentioned would fall directly within the rule announced by this court in its previous decisions, and would, with the deed of assignment, be considered one transaction, having for its object the disposition of the debtor's estate for the benefit of his creditors, and the preference thereby attempted to be created be declared void."

The pertinency of the foregoing citation to the facts of this case is obvious.

It is also insisted by appellant that the mortgage was delivered May 11th, and became a valid lien prior to the assignment.

As to a delivery at that time, the general finding of the County Court being against appellant, it is to be presumed that its conclusion as to all questions of fact was such as

tends to support the judgment rendered. We see no sufficient reason for reversing its conclusion in this regard.

When the company became insolvent its directors became trustees for its creditors, and incapable of acting as agents for any other creditor to enable him to obtain a preference. *Atwater v. Am. Ex. Bank*, 40 Ill. App. 503; *Beach v. Miller*, 130 Ill. 170; *Commercial Nat. Bank v. Burch*, 141 Ill. 519.

That the mortgage passed out of the custody of the mortgagor was owing to the action of a director of the insolvent when the papers for its assignment were, by its direction, in course of preparation.

We see no sufficient reason for interfering with the order of the County Court, and it is affirmed.

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Angelica Kuehne and Charles Kuehne v. Edward J. Goit.

1. JUDGMENTS—*Vacating After the Term.*—All objections to irregularities in entering a judgment, come too late after the adjournment of the term. It is only for reasons affecting the justice and equity of the judgment that it can be set aside at a subsequent term.

2. PROMISSORY NOTES—*Filling up Blank Indorsements.*—Where a note is held under an indorsement in blank, filling up the indorsement is mere form, and may be wholly omitted. The holder under such an indorsement may sue in the name of any person who consents.

3. ATTORNEYS—*Court Take Judicial Notice of, etc.*—A court of record is presumed to know the members of the bar practicing before it.

Memorandum.—Judgment by confession. Error to the Superior Court of Cook County; the Hon. GEORGE F. BLANKE, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed March 29, 1894.

The opinion states the case.

F. W. JAROS, attorney for plaintiffs in error.

BRIEF OF DEFENDANT IN ERROR, ARNOLD HEAP AND WILLARD
& EVANS, ATTORNEYS.

If the first indorsement is in blank it is in effect making the note payable to bearer, and the note may thereafter be

Kuehne v. Goit.

transferred by delivery. Chitty on Bills, pages 228 and 230; Morris v. Preston, 93 Ill. 215.

The Revised Statutes of Illinois of 1874, section 8, chapter 98, negotiable instruments, in force for many years past, and now, provide:

“Any note * * * made payable to bearer may be transferred by the delivery thereof, and an action may be maintained thereon in the name of the holder thereof.”

Possession of a promissory note indorsed in blank is evidence of title. Burnah v. Cook, 32 Ill. 168; Palmer v. Nassau Bank, 78 Ill. 380.

Any person who holds a note may bring an action on the same if indorsed to bearer or in blank, without his being required to show an interest in the same, unless he possess the note under suspicious circumstances; and if the question of “*mala fide possessio*,” which is one of fact to be submitted to the jury, is not raised by the defendant, the court will not inquire into the right of the plaintiff, but will consider possession of the note as evidence of property. McHenry v. Ridgley, 2 Scam. 309; Kyle v. Thomson, 2 Scam. 432; Campbell v. Humphreys, 2 Scam. 479.

A person who holds a note may bring suit, or a suit brought by an owner in the name of a third person, even without such person's knowledge or consent, will be maintained. Hillborn v. Argus, 3 Scam. 344; Waggoner v. Colvin, 11 Wend. 27; Gage v. Kendall, 15 Wend. 640.

The cashier of a bank may commence suit in his own name for the bank, the owner of the note. Palmer v. Nassau Bank, 78 Ill. 380.

What consideration passed between the assignor and the assignee of a note does not affect the maker. He has nothing to do with it. Hutchinson v. Crane, 100 Ill. 274.

The want of consideration can not be insisted upon if the plaintiff, or any intermediate party between him and the defendant, take the bill or note *bona fide* and upon a valuable consideration. Bailey on Bills, page 550 (Phillip & Sewells' Ed.).

One who purchases commercial paper for value with notice

of defects in its inception from a *bona fide* holder without notice, stands upon the rights of the latter, and may recover the amount of the paper. *Haskell & Garry v. Whitmore*, 19 Me. 102.

A note indorsed in blank and transferred by delivery, where the holder acquires the same after maturity, is protected by the first *bona fide* acquisition prior to maturity. *Boyd v. McCann*, 10 Md. 118; *Woodworth v. Huntoon*, 40 Ill. 131; *Simons v. Merritt*, 33 Ia. 577.

Any other rule would defeat the negotiability and circulation of negotiable paper. *Peabody v. Reeves*, 13 Ia. 571.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

November 4, 1893, the last day of the October term, in the Superior Court, judgment by confession was entered in favor of Goit against Charles Kuehne and his mother, Angelica Kuehne, upon a promissory note with warrant of attorney attached, as follows:

“CHICAGO, October 11, 1892.

One year after date, for value received, we promise to pay to the order of John Mathias Bredt \$2,000, at his office, 137-139 State street, with interest at 6 per cent per annum after date until paid.

And, to secure the payment of said amount, we hereby authorize, irrevocably, any attorney of any court of record, to appear for us in such court, in term time or vacation, at any time after maturity, and confess a judgment, without process, in favor of the holder of this note, for such amount as may appear to be unpaid.

ANGELICA KUEHNE, Surety.”

CHARLES KUEHNE.

December 5, 1893, the second day of the December term, the defendant below moved to set aside that judgment upon affidavits showing that she was merely a surety, and that Charles, having been in partnership with Bredt, was induced by false and fraudulent representations made by Bredt as to the condition of the firm, to buy him out, giving this note, for which there was in fact no consideration.

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Charles stated in his affidavit that on the 6th and 7th days of November, Goit told him that the note was put into his hands by Bredt for collection; that it had been taken out of his possession a few days before; that he did not know what had become of it.

That affidavit further states that the affiant believes that the judgment was entered in the name of Goit, without his knowledge, for the benefit of Bredt.

On behalf of Goit were affidavits of Goit himself, of Bredt, and of Carl Moll, cashier of the National Bank of Illinois, showing that before maturity the note was indorsed to the bank as collateral security for a larger indebtedness, still unpaid, of Bredt, to the bank; that Goit was a book-keeper in the bank, and the judgment was entered in his name for the benefit of the bank.

Goit denied the conversation alleged by Charles, and stated that, not knowing the facts in regard to the note, he had referred Charles to the assistant cashier.

All objections for irregularities, if there be any, in entering the judgment, are too late; only for reasons affecting the justice and equity of the judgment can it be set aside at a term after it was entered. *Packer v. Roberts*, 40 Ill. App. 445.

Nevertheless, we will consider the objections made.

First, that the warrant is to "any attorney of any court of record," and that there is no such attorney as "Walker & Walker" who signed the *cognovit*.

We may be mistaken in our conjecture that "Walker & Walker" means two persons. No law would forbid parents named Walker naming a child "Walker &." In Cromwell's time during the French Revolution stranger names were in use, and the Superior Court is presumed to know the members of the bar practicing there. *Crane v. Nelson*, 37 Ill. App. 597.

In any case the objection is of no merit. *Zimmerman v. Wead*, 18 Ill. 304.

The objection that Goit had no interest in the note is by the brief of the plaintiffs in error subdivided into several

heads, but is answered by the fact that the bank held the note under an indorsement in blank by Bredt. Filling up such an indorsement is mere form, and may be wholly omitted. *Trainer v. Adams*, 54 Ill. App 523.

The holder under such an indorsement may sue in the name of any person who consents. *Law v. Parnell*, 7 C. B. N. S., 282, 97 E. C. L. 281.

By the affidavits filed on behalf of Goit, and such affidavits were admissible (*Truby v. Case*, 41 Ill. App. 153), it is made to appear so clearly that there can be no reasonable doubt of it, that the bank was a *bona fide* holder of the note, for value, deriving its title by indorsement of the payee before maturity.

In such case the makers, however much they were wronged by the payee, can have no redress or relief at the expense of the assignee. *Thayer v. Richard*, 44 Ill. App. 195.

The judgment is affirmed.

Albert Dallemand et al. v. Bank of Nova Scotia et al.

1. SURETIES—*Right to Require Holder to Proceed Against the Principal*.—In certain cases a security on a negotiable note may notify the holder to proceed against the principal, on the maturity of the note, otherwise he can not compel the holder to proceed against others before proceeding against himself, and exhaust such other remedies as he may have.

Memorandum.—In chancery. Bill for an injunction and relief. Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed March 29, 1894.

The opinion states the case.

B. M. SHAFFNER, attorney for appellants.

DEFREES, BRACE & RITTER, attorneys for bank of Nova Scotia.

Dallemand v. Bank of Nova Scotia.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellants are a partnership who were customers of the firm of Herman Schaffner & Co., private bankers, who failed in Chicago June 3, 1893. Not long before that failure the appellants had procured the discount by the bankers of two notes of \$5,000 each, made by the appellants, which were not due when the bill here was filed.

The case made by the bill is that the appellants, at the time of the failure, had on deposit with Schaffner & Co. nearly enough to pay the notes; that Schaffner & Co. were borrowers from the bank to an amount not stated, and among the securities held by the bank are the two notes made by the appellants, and that the bank holds securities for the indebtedness of Schaffner & Co., to an amount exceeding \$45,000 in excess of the indebtedness; that Schaffner & Co. are insolvent and will not pay ten per cent of their debts. In short, what the appellants seek is that the bank be required to realize upon its other collaterals first, so that when the bank is thereby paid, the appellants may have an opportunity to set off their deposits with Schaffner & Co. against the notes.

The bill avers that they offered to indemnify the bank and the offer is renewed in the bill.

The bill contains no offer to take the place of the bank, by paying to it what Schaffner & Co. owe, and taking the collaterals, and it is therefore not necessary to consider what they might have been entitled to, had there been such an offer.

On the bill as framed, their right to an account hangs upon their right to any final relief, and they fail to show any—assuming that the circumstances place the appellants in the position of sureties to the bank for Schaffner & Co.—as the appellants contend, and even then the remarks of the Supreme Court in *Prout v. Lomer*, 79 Ill. 331, apply: “In certain cases, and this is not one, a security to a negotiable note may notify the holder to proceed against the principal on the maturity of the note. Independent of this, a surety can not compel the holder to proceed against others before

proceeding against himself, and exhaust such other remedies as he may have."

As said by the Supreme Court of Pennsylvania in *Evans v. Duncan*, 4 Watts, 24, "It may be very advantageous and all important to them (the bank) to receive their money with as little delay as possible; and being entitled to have received their debts long since, if they could have got them, it would therefore be contrary to both law and equity to pass a decree that would, in its effect, delay them in the receipt thereof a single minute longer than is indispensably necessary for a final determination of the controversy." This was said where the facts had no resemblance to those here, but the principle that equity regards the interests of creditors as well as of debtors, is well put.

The decree dismissing the bill is affirmed.

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Marcus Zinner v. National Bank of Illinois.

1. CHECKS—*What is a Valid Transfer.*—Appellant drew a check upon the banking house of H. S. & Co., and delivered it to the Merchants Nat. Bank in payment of a note. The Merchants Nat. Bank stamped on the back of the check: "Paid through Chicago Clearing House June 3, 1893, to the Merchants Nat. Bk.," and through the clearings of that day it came to the appellee and was paid. *It was held*, that the stamp put on the check by the Merchants Nat. Bank was intended as a transfer of the check to the appellee. The banking house of H. S. & Co. having failed, appellee recovered the amount of the check from appellant.

2. SAME—*Indorsements.*—An indorsement may be made by any form of words or characters intended to so operate.

Memorandum.—Assumpsit upon a check. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed May 28, 1894.

The opinion states the case.

APPELLANT'S BRIEF, STEIN & PLATT, ATTORNEYS.

Plaintiff can not recover in its own name, on an instrument drawn to the order of a third party, unless the in-

Zinner v. Nat. Bank of Illinois.

strument had been properly transferred to plaintiff by indorsement. *Ryan v. May*, 14 Ill. 49.

The words stamped on the back of the instrument in suit here, "Paid through Chicago Clearing House, June 3, 1893, to the Merchants National Bank," are not such an indorsement as to transfer the legal title to the plaintiff. *Simpson v. Ranlett*, 2 Gilm. 312; *Gibson v. Minet*, 1 H. Bl. 605.

Such words constitute a mere receipt, and have no other effect. *Keene v. Beard*, 8 C. B. (N. S.) 382; *Morse on Banking*, Sec. 391; *White v. Fisher*, 62 Ill. 258.

Plaintiff, in an action at law on a negotiable instrument, can claim no rights depending on the equitable doctrine of subrogation. *Meyer v. Mintonye*, 106 Ill. 414; *Rossa v. Crist*, 17 Ill. 450; *Garfield v. Berry*, 5 Brad. 355; *Best v. Nokomis Bank*, 76 Ill. 608.

The transfer of a negotiable instrument occurs only when both buyer and seller intend a contract of sale at the time of transfer. *Edwards on Bills*, Sec. 729; *Lancey v. Clark*, 64 N. Y. 209; *Eastman v. Plumer*, 32 N. H. 238; *Merrimac Bank v. Parker*, 7 Pick. 88; *Moran v. Abbey*, 63 Cal. 56; *Binford v. Adams*, 104 Ind. 41.

Herman Schaffner & Co. were primarily liable and the defendant only secondarily liable on this check. *Bickford v. Bank*, 42 Ill. 238; *Morse on Banking*, Sec. 415; *Daniel Neg. Inst.*, Sec. 532; *Drovers Bank v. Provision Co.*, 117 Ill. 100; *Metropolitan Bank v. Jones*, 137 Ill. 634.

The check was paid by plaintiff without request from the defendant, and therefore plaintiff can not recover. *Ricketson v. Giles*, 91 Ill. 154; *White v. White*, 30 Vt. 338.

APPELLEE'S BRIEF, MORAN, KRAUS & MAYER, ATTORNEYS.

The drawer of a check having it certified before delivery, in no way diminishes the drawer's primary liability in case of non-payment by the bank upon which it is drawn. *Continental Nat. Bank v. Cornhauser*, 37 Ill. App. 475; *Metropolitan Natl. Bank v. Jones*, 137 Ill. 634; *Rounds v. Smith*, 42 Ill. 245; *Brown v. Leckie*, 43 Ill. 497; *Randolph Natl. Bank v. Hornblower et al.*, 35 N. E. Rep. 850.

In this respect there can be no difference between an uncertified and a certified check; non-payment by the bank of either leaves the drawer primarily liable. *Bickford v. First Natl. Bank*, 42 Ill. 238.

The stamp upon the back of the check in question, both in point of law and fact, constitutes an indorsement or assignment, sufficient to transfer to the appellee the rights of the Merchants National Bank, the payee of the check. *Brown v. Butcher's Bank*, 6 Hill (N. Y.), 443; *Simpson v. Ranlett*, 2 Gilm. (Ill.) 312; *Church v. Barlow*, 9 Pick. 547; 1 Daniel on Neg. Inst., Sec. 688 b, *et seq.* (4th Ed.)

The members of the clearing house association could make any rule which they chose to control their own business dealings, and could agree upon any mark or stamp which they might consider and treat as an indorsement, which would bind the parties on such check. *Gindrat v. Mech. Bk.*, 7 Ala. 333; *Bank of Utica v. Smith*, 18 Johns. 230; *Brown v. Butcher's Bank*, 6 Hill (N. Y.), 443; *Marrett v. Brackett*, 60 Me. 524; *Halsey v. Brown*, 3 Day, 347; *Renner v. Bank of Col.*, 9 Wheat. 582; *Overman v. Hoboken City Bank*, 1 Vroom (N. J.), 61.

Appellee occupies the position of an indorsee or assignee of the check in question, and the fact that it had given a guaranty to the Merchants National Bank, in no way impairs or affects its right to recourse against the drawer. Appellee did not guarantee the payment of the check to appellant, and appellant would have had no action against appellee thereon. *Bishop v. Rowe*, 71 Me. 263; *Pacific Bank v. Mitchell*, 9 Met. 297; *McGregory v. McGregor*, 107 Mass. 543; *Pinney v. McGregor*, 102 Mass. 186; *Sheldon on Subrogation*, page 285; *Swope v. Leffingwell*, 72 Mo. 348.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an action by the appellee upon a check drawn by the appellant upon the banking house of Herman Schaffner & Co., and by them certified while it was still in his own hands.

He delivered it to the Merchants National Bank in pay-

Zinner v. Nat. Bank of Illinois.

ment of a note. The Merchants Bank held the guaranty of the appellee in these words:

“Illinois Bank Building, 115 Dearborn street.

CHICAGO, February 15, 1886.

JOHN C. NEELY, Esq., Cashier, City.

Dear Sir: This bank hereby holds itself accountable for payment on presentation in the regular course to it of any and all checks or drafts drawn upon the banks and bankers below named, or either of them, and properly certified or accepted by them. This obligation, however, to apply to such drafts or checks as may be received by you in the course of your business in payment of collections or discount items.

The International Bank, Leopold Mayer, H. J. Christoph, John Beuhler, Herman Schaffner & Co.

Yours very truly,

W. A. HAMMOND, Cashier.”

The Merchants Bank stamped on the back of the check: “Paid through Chicago Clearing House June 3, 1893, to the Merchants National Bank,” and through the clearings on that day it came to the appellee, which was by the guaranty bound to pay it, as it did. It is clear that the stamp put on the check by the Merchants Bank was intended as a transfer of the check to the appellee; without such transfer the appellee could not use the check in its accounts with Schaffner & Co.

Schaffner & Co. failed, and did not open their bank on June 3, 1893, so the check could not be paid, though the appellant had funds with them.

Now that the Merchants Bank could have recovered against the appellant on the check if it had not sent the check to the clearing house is settled by *Bickford v. First National Bank*, 42 Ill. 238.

The agreement by the appellee to the Merchants Bank affected only the relations of those banks to each other; third persons derive no benefit or harm from it.

An indorsement may be made by any form of words or characters intended to so operate. *Dan. Neg. Inst.*, Sec. 688; *Rand. Com. Pap.*, Sec. 704.

There is no error and the judgment is affirmed.

**William F. White v. Clair E. More, Assignee of the
Wah Mee Exposition Company, Insolvent.**

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1. **ASSIGNMENTS FOR THE BENEFIT OF CREDITORS—Assignee Takes Cum Onere.**—Where an assignment for the benefit of creditors is made, the assignee takes the property *cum onere*.

2. **SAME—Expenses of Administration—Rent of Premises.**—The rent of premises occupied by an assignee while winding up the affairs of the insolvent is a part of the expenses of administration, to be paid before distributing dividends to the general creditors.

Memorandum.—Assignment for the benefit of creditors. Appeal from the County Court of Cook County; the Hon. FRANK SCALES, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed April 19, 1894.

The opinion states the case.

APPELLANT'S BRIEF, J. G. EGAN, ATTORNEY.

The assignee had no greater right or interest in the revenue of the business than the assignor had, and he acquired the business subject to all liens, equities and existing rights and interests of other persons.

An assignee takes subject to all equities, and has no better title than the assignor has. *Davis v. Chicago Dock Co.*, 129 Ill. 180.

He takes subject to all incumbrances, whether created by operation of law or by act of the insolvent. *Jack v. Weiemett*, 115 Ill. 105; *Field v. Ridgely*, 116 Ill. 424; *Yates et al. v. Dodge, Executrix*, 123 Ill. 50-56; *Colburn et al. v. Shay et al.*, 17 Brad. 289, 293, 294; *Burrill on Assignments*, page 615, 5th edition.

The County Court has such equitable jurisdiction, and that it takes property assigned subject to all liens. *Wilson v. Aaron*, 132 Ill. 238; *Freydenthall v. Baldwin*, 103 Ill. 325; *Farwell v. Crandall*, 120 Ill. 70.

The County Court has jurisdiction to enforce every equitable assignment, lien and interest, as well as every legal assignment, lien and interest. *Hanchett v. Waterbury*, 115

White v. More.

Ill. 220; Preston v. Spaulding, 120 Ill. 208; Field v. Ridgely, 116 Ill. 424; Newlin v. Baily, 15 Brad. 199.

WEIGLEY, BULKLEY & GRAY, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee is the assignee for the benefit of creditors of the Wah Mee Exposition Company, administering its assets under the direction of the County Court.

August 24, 1892, by an agreement between White and the World's Columbian Exposition, the latter granted to White a "concession" of the exclusive use of a parcel of land within the grounds of the company, "and the right to erect and maintain upon said tract upon the terms and conditions hereinafter set forth, a Chinese village, and the exclusive right to erect and maintain a Chinese theater and a Chinese Joss house, and also the exclusive right to maintain a Chinese tea garden and cafe, and the right to sell in said cafe tea, coffee and non-intoxicating beverages, and food and dishes, subject to approval as hereinafter set forth, and the further right to sell upon said space, tea, Chinese curiosities and wares, subject to the approval of the Exposition." White agreed that he would pay to the Exposition twenty-five per cent of the gross receipts derived from all sources of revenue under this concession, settlements to be had and payments to be made each day for the previous day's business, and at such times as should be designated by the Exposition; the method of issuing tickets or of arriving at the gross receipts hereunder, to be approved by the Exposition.

White made, September 9, 1892, a contract with Chan Gee We, Chan Kwai and Wong Lat, by which they were to carry on the Chinese part of the business, which contract contained these provisions—White being the "first party" and the Chinamen the "second parties":

"Sec. 3. The parties hereto agree and promise with each other that the receipts from sales of all merchandise, curios, refreshments (including meals furnished employes), admission to theater and Joss house and all other sources what-

ever, shall pass to the cashier or other financial officer, to be or which may be appointed by World's Columbian Exposition, or William F. White, or jointly (said financial agent or agents to be paid by the second parties); all change shall be made by them, and that a system of salesman's double checks shall be used to record all such receipts; such system shall be either approved or prescribed by the officers of the World's Columbian Exposition, or in such other manner as the World's Columbian Exposition may elect as per the terms of Exhibit 'A.'

That at the close of each day's business, or such other time as may be agreed upon by the parties hereto or designated by the World's Columbian Exposition, thirty-five (35) per cent of the gross receipts of each day's business shall be turned over to the first party hereto, and sixty-five (65) per cent to the second party, and that the first party shall pay or cause to be paid to the World's Columbian Exposition twenty-five (25) per cent, required and provided for by Exhibit 'A' out of the thirty-five (35) per cent, to which he is and shall be entitled under this contract.

The second parties hereby also agree to accept said sixty-five (65) per cent, of the gross receipts in full reimbursement and as compensation for all the acts, services, expenses, expenditures and out-goings of whatever kind or nature required of and to be, or which may be made, or done by them under and by virtue of the terms of said Exhibit 'A,' or this contract."

The three Chinamen incorporated themselves in Utah as the Wah Mee Exposition Company, and appointed Hong Sling as manager of the business here. White appointed one Williams as cashier. He received all the money, and put it in bank to the credit of White, and White paid out of it, twenty-five per cent to the World's Columbian Exposition, sixty-five per cent to Hong Sling, who receipted for it as "Wah Mee Ex. Co.'s proportion of receipts for" certain days or periods, and White retained ten per cent.

Business went on without friction until the assignment by the Wah Mee Exposition Company to More, August 25, 1893.

White v. More.

The next day he took possession of the business, turned Williams and his assistant out, received all the money, and refused to divide with White. White filed a petition in the County Court, August 30, 1893, to be reinstated in the receipt of the money; the petition remained pending in the County Court until January 12, 1893, and was then dismissed, and White appealed.

The whole business of the World's Columbian Exposition was then over. The specific relief that White asked, could not then be granted. The funds however—the proceeds of the business—were in the hands of More, and if White had not a mere claim for, but an equitable title to, ten per cent of them, it might and ought to have been awarded to him by the County Court. It had the jurisdiction. *Atlas Nat. Bk. v. More*, 40 Ill. App. 338.

More stood in the shoes of the Wah Mee Exposition Company.

Whatever claim White had *in rem*, upon the business, or funds derived from the business, against the company, was good against More. As assignee he took the property of the company *cum onere*. *Union Trust Co. v. Trumbull*, 137 Ill. 146.

Now, it is clear that as between White and the company and the Chinamen, the latter were the real parties dealing with White; that the company was mere form without substance.

By the arrangement of the business, assented to by all parties in interest, the cashier of White was entitled to the custody, in the first instance, of all money coming in, and from it White was to pay to the World's Columbian Exposition its share, and to the representative of the Chinamen their share. This was not a mere lien upon anything, but the legal title, in trust as to nine-tenths.

It is true that White had no claim or lien upon the stock in trade, but he had a leasehold, a legal estate, by the concession in the place where the business was conducted, and the Chinamen had but a license from him, irrevocable, it may have been, to construct, maintain, and conduct.

When More went into possession he took premises the legal title of which was in White. The ten per cent to be retained by White was his rent.

The rent of premises occupied by an assignee while winding up, is part of the expenses of administration, to be paid before distributing anything among general creditors. *Smith v. Goodman*, 43 Ill. App. 530; same case in the Supreme Court, 36 N. E. R. 621.

The County Court should have ascertained the amount of the receipts by More after he took possession from the business as he conducted it, whether with more "attractions" or not, and awarded to White ten per cent thereof, before any distribution among general creditors. Upon either ground, that White was entitled to all the money in the first instance, or as expenses of administration, he should be preferred.

The judgment of the County Court is reversed and the cause remanded, with directions to the County Court to ascertain the amount of receipts from the business, and award White ten per cent thereof, in preference to general creditors. The costs here are to be paid by the appellee in due course of administration.

Louis A. Roy and E. Raphael Nourse v. James B. Galloway, Francis O. Lyman and James Patton.

1. **BILLS OF EXCEPTIONS—*Skeleton Forms—Exhibits.***—If it is desired to incorporate an exhibit into the record, it must be properly made a part of the bill of exceptions. Using the forms (here insert exhibits, etc.) and fastening the exhibits to the margin of the sheet with pins, is not sufficient.

Memorandum.—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 30, 1894.

The opinion states the case.

HURLEY & KOERNER, attorneys for appellants.

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54	610
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ADOLPH TRAUB, attorney for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The bill of exceptions recites: "Mr. Traub: I offer these two documents in evidence. The Court: I will let the receipt in subject to your motion to strike it out. (Which ruling by the court was duly excepted to by counsel for defendants.) (Here insert 'Exhibits A and B.')" A little above those recitals there is stuck on to the margin of the page with a stout brass pin, a check and receipt with "Exhibit A" on the one and "Exhibit B" on the other. A postal card is "Exhibit D" similarly referred to and pinned on.

The next recital as to an exhibit is: "The plat referred to was offered in evidence by plaintiff's counsel, and marked 'Exhibit C' (here insert);" and a little way down the page a paper with "Exhibit C" on it, as we can see within the folds, is stuck on with two pins. We do not know what that paper is, as the pins confine it in folds.

Suppose these pins get loose, or it should be charged that the exhibits have been changed, how could we determine what is the record? *Charles v. Remick*, 50 Ill. App. 534.

Aside from this, the words of reference in the text of the bill are not sufficient to identify the documents. *Page v. Northwestern Brg. Co.*, 54 Ill. App. 157.

There is no such showing of the proceedings below as will warrant a review here. The abstract shows no instruction, reasons for a new trial, or exception to anything, except as above quoted. We have many times decided that mere indexing does not make an abstract.

Altogether there is too much labor saved in presenting the case, and the judgment is affirmed.

Chicago & Alton Railroad Company v. Louisa Robbins.

1. PRACTICE—*Giving Instructions in the Absence of the Parties.*—After the jury had retired from the bar of the court and were considering their verdict, and after counsel for defendant had retired, a com-

munication was sent by the foreman of the jury to the court, as follows :

“ To the Judge:

“ If the jury should find in favor of the plaintiff, should the damages be assessed up to the commencement of suit or up to the present time ?

B. F. LATHAM, Foreman.”

The judge wrote thereon the following words, viz.: “ Up to the present time,” and sent the same back to the jury. *Held*, not error.

2. DAMAGES--*In Actions Quare Clausum Fregit*.—When a wrongful act is done producing an injury which is not only immediate, but from its nature permanent, and must necessarily continue to produce loss, independent of any subsequent wrongful acts, the damages resulting, both before and after the commencement of the suit, may be recovered in one action.

Memorandum.—Trespass *quare clausum fregit*. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed May 28, 1894.

STATEMENT OF THE CASE.

This is a suit of trespass *quare clausum*, for an alleged injury to appellee's property at the northwest corner of the intersection of Main street and the Alton railroad, in the city of Chicago.

The declaration in substance charges appellee and appellant are the owners of adjacent premises, appellee's fronting on Main street aforesaid, and appellant's lying immediately south. Over appellant's are laid the main and various side tracks of appellant's railroad, the side tracks being on the north side of appellant's and near appellee's lot.

It is charged in the declaration that the appellant, between the 1st day of October, 1882, and the commencement of this suit, and while in the possession of its said premises, was building, filling, grading, laying ties, cross-tracks, railroads, and making other improvements on said premises, and by its servants so carelessly, negligently and improperly prosecuted said work, that the appellee was greatly injured and damaged in her property and possession, and the same and certain improvements thereon, to wit, two houses and fences were greatly injured, damaged and destroyed, and that said appellant placed and laid divers large quantities of dirt,

gravel, etc., upon said premises, and kept and continued the said dirt and gravel so there put, placed and laid without the leave or license and against the will of plaintiff, and kept the same there until the commencement of this suit, and then and there shattered, destroyed and damaged two dwelling houses and made them untenable.

And that divers sparks, brands of fire, smoke and soot, were by the carelessness, negligence, etc., of defendant, thrown upon said dwelling houses, and they thereby became untenable, etc.

The plea of the general issue was filed.

The defendant offered in writing various instructions, some of which were given and others refused. After the jury had retired from the bar of the court and were considering of their verdict, and after counsel for defendant had retired from the court, a communication was sent by the foreman of the jury to the court, in substance, as follows:

“To the Judge:

If the jury should find in favor of the plaintiff, should the damages be assessed up to the commencement of suit or up to the present time?

B. F. LATHAM, Foreman.”

The “court” or judge thereof, wrote thereon the following words, viz: “Up to the present time,” and sent the same back to the jury, whereupon the jury rendered their verdict.

The case was commenced on the 12th day of October, 1887, and tried before Judge Richard M. Clifford and a jury on the 17th and 18th days of October, A. D. 1893, and on the 19th day of October, 1893, a verdict was rendered by the jury of defendant guilty, and plaintiff’s damages assessed at \$1,100.

APPELLANT’S BRIEF, JOHN M. SOUTHWORTH, ATTORNEY.

If damages (beyond mere nominal damages) are recoverable at all, they should be limited to injuries sustained prior to the commencement of this suit, and hence computed by the jury only up to that time. Wood’s Mayne on Damages

(1st Ed.), 141, and cases cited; 3 Sutherland on Damages, 369, and cases cited; 5 Am. & Eng. Enc., 1,820.

The court erred in sending to the jury a communication and directions to compute damages up to the time of the trial of the cause, and this after the jury had retired from the bar of the court and in the absence of counsel for the defendant. 11 Am. & Eng. Encyc. Law, 262, and cases cited.

H. T. & L. HELM, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It is urged that it was reversible error for the court in the absence of counsel to instruct the jury to compute damages up to the time of the trial of the cause.

We do not think that, the jury having asked for further instructions, it was the duty of the court to delay an answer until appellant or its counsel could be hunted up and brought in. The entire proceeding was in open court. The absence of appellant was entirely voluntary on its part, and the court was under no obligation under such circumstances to keep the jury waiting until appellant came in. Nor do we think that the mere omission of the court to write, "Given" upon the instruction handed to the jury at their request, warrants a reversal of the judgment in this case.

In determining as to up to what time damages in an action of trespass *quare clausum fregit* are to be computed, the nature and effect of the trespass are to be considered. This subject was very fully commented upon in the Town of Troy v. Cheshire R. R. Co., 23 N. H. 83-101. The rule there enunciated is: "Whenever the nuisance is of such a character that its continuance is necessarily an injury, and where it is of a permanent character, that will continue without change from any cause but human labor, there the damage is an original damage, and may at once be fully compensated, since the injured person has no means to compel the individual doing the wrong to apply the labor necessary to

remove the cause of injury, and can only cause it to be done, if at all, by the expenditure of his own means.”

The Supreme Court of this State in *Cooker v. Randall et al.*, 59 Ill. 317, said: “When a wrongful act is done which produces an injury which is not only immediate, but from its very nature is permanent, and must necessarily continue to produce loss, independent of any subsequent wrongful acts, then the damages resulting, both before and after the commencement of the suit, may be estimated and recovered in one action.”

The trespass in the present case is not only of a permanent nature, and one which will continue to produce loss, independent of any subsequent acts, but having been committed by a public railway corporation in the construction of its road bed, it is as against appellant to be presumed that what it has done was and is a proper construction necessary to the transaction of its duty to the public.

It is true that the declaration does not in terms allege a permanent injury; but it sets forth a trespass, which is in its nature permanent unless removed by human labor.

The allegation, in terms, of a permanent injury, is not in this State, after verdict, necessary to the maintenance of a judgment for permanent damages in an action of trespass *quare clausum fregit*. *C. & G. W. R. R. Co. v. Wedel*, 44 Ill. App. 215; 144 Ill. 9.

The question of where the true boundary line lay, as well as of the amount of the damage, if any, appellee had sustained, were matters of fact peculiarly for the determination of the jury.

We do not find anything tending to sustain appellant's contention that appellee did anything to augment the damage resulting from the trespass.

The amount awarded may be large, considering the injury actually sustained, but we find in this record nothing that enables us to say with any degree of certainty that such is the case.

The judgment of the Circuit Court is therefore affirmed.

**Louis Heintz et al. v. Sarah A. Pratt, Administratrix,
etc.**

1. **AMENDMENT—Of Judgments—After Appeal Taken.**—In a suit brought against two defendants, one of whom only being served, by misprision of the clerk, judgment was entered against both, the word “defendants” being used for the word “defendant.” *It was held* properly amended by making the correction, even after an appeal was taken.

2. **RELEASE—On Payment of Lesser Sum.**—A payment of a lesser sum will not discharge a debt for a greater sum, without some additional consideration; the creditor must, besides a part, receive something of benefit that he would not otherwise have had.

Memorandum.—Assumpsit on a promissory note. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1894, and affirmed Opinion filed April 30, 1894.

The opinion states the case.

RUNYAN & RUNYAN, attorneys for appellants.

EDGAR B. TOLMAN, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action brought by plaintiff as administratrix of the estate of Joseph Pratt, deceased, against Louis Heintz and M. C. Meyer, upon a note made payable to Joseph Pratt, signed by each of the defendants.

In this State a judgment at law is an entirety. *Brockman v. McDonald*, 16 Ill. 112; *Williams v. Chalfant*, 82 Ill. 218.

An appeal was taken by Louis Heintz. After the appeal to this court was perfected, the following order was made by the Circuit Court:

It appearing to the court that the word “defendants” instead of the word “defendant” has been erroneously used in entering up the judgment in this cause, and it further appearing to the court from the original summons and the

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return thereof filed in said cause, and from the files of said cause, that the defendant, M. C. Meyer, has never been served with process or appeared in said cause, now on motion of plaintiff, by his attorney, of which said motion the defendant, Louis Heintz, has had due notice, and he being now present by his attorney, it is ordered that the said judgment entered in said cause heretofore, to wit, January 18, 1894, be and the same is hereby amended, so that wherever the word "defendants" appears in said judgment and the record thereof, the following words, viz.: "defendant, Louis Heintz," shall be substituted in lieu thereof, so that said judgment shall be against the defendant Louis Heintz only.

Such correction was entirely proper, the error in entering judgment against a defendant who was not brought into and did not appear in the cause was, as appeared by the files of the cause, a mere misprision of the clerk. Black on Judgments, Sec. 157; Seely v. Pelton, 63 Ill. 101, 105; Tucker v. Hamilton, 108 Ill. 464; Terry v. Trustees, 70 Ill. 236; Church v. English, 81 Ill. 442; Gillett v. Booth, 95 Ill. 183.

It was insisted upon the trial that this note for \$611.25 had been satisfied by a payment of \$150 under an agreement to that effect.

A payment of a lesser sum will not discharge a debt for a greater sum, without some additional consideration; the creditor must, besides a part, receive something of benefit that he would not otherwise have had. Titsworth v. Hyde, 54 Ill. 389; Curtis v. Martin, 20 Ill. 557-577; Martin v. White, 40 Ill. App. 281.

The judgment of the Circuit Court is affirmed.

People ex rel. Mary S. Crofut v. John Gibbons.

1. **MANDAMUS**—*To Compel a Judge to Sign a Bill of Exceptions.*—A writ of mandamus will lie to compel a judge to sign a bill of exceptions, but it is for him to determine the accuracy of the matters to be incorporated in it.

Memorandum. — Mandamus. Original proceedings in this court. Heard at the March term, 1894, and mandamus granted. Opinion filed April 5, 1894.

The opinion states the case.

W. H. HECKMAN and J. G. ELSDON, attorneys for petitioner.

MARSTON, AUGUR & TUTTLE, attorneys for respondent.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This is an application for a peremptory writ of mandamus against the respondent, who is one of the Circuit Court judges of Cook county, requiring him to sign and seal a bill of exceptions, showing all the evidence offered in the cause of Frederick C. Aldrich vs. the relator and others, in the said Circuit Court, including all the evidence offered at the time of the rendition of the judgment, as well as all the evidence offered upon the motion to set aside said judgment.

The judgment was entered by confession upon promissory notes, under a power claimed to be conferred by certain warrants of attorney attached to said notes.

The respondent by his answer denies that he has ever refused to sign a bill of exceptions which shall contain all that occurred before him on the motion to set aside the judgment, but admits that he did refuse to sign the bill of exceptions which was presented to him, because it purported to include matters and things which occurred in court before him at the time judgment was entered in said cause, concerning which no affidavit or other testimony was presented at the hearing of the motion to set aside the judgment, and says that a judge ought not to be permitted to certify to matters not so presented by affidavits or other methods known to the law, when such matters do not appear of record, or of which there is no memoranda of record, because a judge is not supposed to remember all that transpired at the time of rendering judgment, and concludes by offering to obey, so far as he is able, the mandate of this court if it

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shall be determined that he ought to sign and seal a bill of exceptions purporting to contain matters which are not made to appear otherwise than by his recollection of what transpired at the time the judgment was entered.

It is alleged in the petition and is not denied by the respondent, that no evidence was offered or heard by the court when the judgment was entered except the original notes and warrants of attorney.

For the purposes of this opinion it may be assumed, from the petition and answer, that the controversy is as to whether the judge should incorporate into a bill of exceptions a negative fact recollected by him but which is not made to appear by affidavit or otherwise.

It was held by this court in *The People v. Horton*, 46 Ill. App. 439, that as an incident to a party's right to a bill of exceptions, he has a right to the assistance of the judge, whenever necessary, to enable him to present a true and complete bill.

In *Anderson v. Field*, 6 Ill. App. 307, it was held that a negative fact, such as that no proceedings in open court were had, or no evidence was heard, being a fact within the personal knowledge of the judge, need not be shown by proof *aliunde*.

And, as was held in *The People v. Williams*, 91 Ill. 87, and *The People v. Gary*, 105 Ill. 264, if no memoranda of the proceedings were made at the time, and the judge can not remember what transpired, he may, with the aid of counsel on each side of the case, or of witnesses who, if there were any, had been sworn on the trial, determine what the fact was about the evidence, or lack of evidence, if there was none, that should be incorporated into the bill of exceptions. The motion to vacate the judgment was made at the same term, and the application for the bill of exceptions was made in due time.

The judge never stated to the party applying for the bill that he did not remember that no evidence besides the notes and warrants of attorney were offered, and until he should have done so, counsel for petitioner was not required to make proof *aliunde* of what did not transpire.

The petition alleges that the judge did state on the hearing of the motion to vacate the judgment that there was no other evidence presented than the papers spoken of, and the respondent by his answer substantially admits that he did so say, but sets up in avoidance of the effect of such statement, the counter-statement that it was not made as a recital of what actually happened, nor as evidence, nor as an admission.

Although such a statement should not be held as binding the judge who made it to incorporate into the bill of exceptions the fact about which he was speaking, in the same broad manner in which he stated it, nevertheless such a statement, unrecalled, afforded justification to the relator for not producing evidence of the fact *aliunde*.

Every bill of exceptions when properly made up embodies a statement of the negative fact that it contains all the evidence, and such statement is certified to by the trial judge.

The point that a judge should not certify to facts which transpired on the trial before him, the existence of which rest within his personal recollection of what did then transpire, because such facts might tend to impeach the record of the judgment rendered by him, can not be sustained.

The object of a bill of exceptions is to present to the Appellate Court all such proceedings and matters as transpired in the court below and as do not appear of record, relating to the order or judgment appealed from, in order that such order or judgment may be overturned, if error shall have intervened.

The certification by the judge to the true facts as they transpired in this cause, can no more be said to constitute an impeachment of the record made by him, than would be the case of the certificate by the judge to any other bill of exceptions.

What is wanted is the truth as to what transpired and as to all that transpired. This can only be established by a bill of exceptions, signed and sealed by the judge, as to all things other than what appears by the record proper,

Madsen v. Paul.

wherein either by express and affirmative statement, or by way of negation and exclusion, everything may be known.

Having the fact thus established, the effect of such fact is to be determined by the reviewing tribunal.

If the trial judge has within himself, by recollection or otherwise, the means of determining what the fact is, he should incorporate it into the bill, and if he does not retain sufficient recollection or otherwise know the fact, he may avail himself of any lawful mode of ascertaining it.

“We do not hold that the certificate of evidence prepared by the petitioner and presented to the judge, is the one to be signed by the respondent.

We merely decide that, under the circumstances of this case, the petitioner is entitled to have a certificate of evidence signed. It is for the respondent, the judge before whom the cause was tried, to determine the accuracy of the certificate and things to be incorporated in it.

As said in *The People v. Pearson*, 2 Scam. 189, he must sign such a one as he believes to be correct, and none other.” *People v. Williams, supra.*

The peremptory writ of mandamus is awarded.

Christian Madsen v. William O. Paul.

1. APPELLATE COURT PRACTICE—*Defective Bill of Exceptions*.—The court is not bound to examine an appeal where the bill of exceptions is defective. It may, however, examine the abstract and record to see if sufficient reason exists for interfering with the conclusion arrived at by the jury and trial judge.

Memorandum.—Assumpsit. Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 19, 1894.

J. W. MERRIAM, attorney for appellant.

JOHN C. RICHBERG, attorney for appellee.

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Pennsylvania Coal Co. v. Kelly.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The bill of exceptions in this case is imperfectly made, and we might well decline to consider the facts therein set forth. Notwithstanding this we have examined the abstract and record, and see no sufficient reason for interfering with the conclusion arrived at by the jury and trial judge.

After the plaintiff's claim became due there was a settlement, as the defendant testifies, of all matters relating to the real estate transaction out of which the plaintiff's claim arose. Upon cross-examination the defendant admitted that this particular claim was not mentioned in such settlement. Such settlement was intended to be of all matters and was supposed by both parties to be full and complete.

Two juries have found in favor of appellee. The last jury was fairly instructed, and it is likely that a third trial would result as have the two already had.

The judgment of the Superior Court is therefore affirmed.

MR. JUSTICE GARY.

I think the bill of exceptions is so defective that the merits of this case are not open. I therefore concur in affirming.

The Pennsylvania Coal Company v. John Kelly.

1. MASTER AND SERVANT—*Duty of Master, etc.*—The master is bound to use reasonable care in providing safe machinery, appliances, surroundings, etc., and the servant, in the absence of notice that the machinery, etc., is unsafe or defective, has a right to rely upon the discharge by the master of his duty in respect to these matters.

2. SAME—*Duty of Servant.*—The servant is bound to take notice of what is before him and obvious to his senses.

3. SAME—*What Defects the Master is Not Charged With.*—The master is not charged with knowledge of defects which can not be discovered save by the exercise of extraordinary care. He does not insure the safety or soundness of his machinery.

54	622
156s	9
54	622
61	307

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4. *SAME—Master Presumed to Have Knowledge, etc.*—The master is presumed to have a knowledge of the principles upon which his machinery works, and therefore of the consequences likely to arise from defects of which he has notice. If an accident arise from a defect of which he had notice, he can not say that he did not think the defect to be of any consequence.

5. *SAME—Of What Notice a Servant is Chargeable.*—A servant is chargeable with such notice of the character of what is apparent, as by his employment he assumes to have, or from his education or experience he actually has.

6. *SAME—Relative Duty of Master and Servant.*—The master is charged with the duty of exercising reasonable care to see that the machinery provided is safe, while the servant is only chargeable with notice of such things as by the exercise of reasonable care he would have known.

7. *SAME—Where Notice of Defects Will Not Defeat Claim.*—A knowledge of a defect, if the servant does not, or is not presumed to know it to be dangerous, will not defeat his claim for an injury caused by such defect.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. SAMUEL P. McCONNELL, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 5, 1894.

STATEMENT OF THE CASE.

This was an appeal from a judgment of the Circuit Court of Cook County, in an action on the case, brought by the appellee against the appellant, for an injury received by the appellee, August 21, 1890, while unloading coal from a vessel at the dock of the appellant on the north branch of the Chicago river, and North May street, Chicago.

The vessel came to the dock of the appellee with a cargo of coal, and the appellee, with three other men, began to work on the morning of August 19th, unloading said coal, with coal buckets lowered down into the hole and hatchway of said vessel, and raised by steam power from the hold up to a boom extended over the hatchway. The buckets were then carried along said boom up an incline to a hopper, into which the coal was automatically dumped by the upper end of the latch on the coal-bucket striking a roller, which lifted the latch holding the tub, and caused the tub to dump into the hopper. The ap-

pellee was familiar with the tubs in use, and had had twenty years or more experience with them. The day before he began work he went to the yard of the appellant, and took the tubs to the vessel; he went to work with the tubs on the morning of August 19th; worked all that day with three other men; worked the next day, August 20th; the tubs worked all right and in perfect order.

On the morning of August 21st, the plaintiff, with three other men, went to work with the tubs, filling them as they came down into the hold, filling one tub down in the hold, while the other was going up by the hoisting apparatus with its load to the hopper in the yard. After they had been at work a little more than an hour the appellee went to work under the tub, while the tub was rising, and the tub unloaded its coal upon the appellee and caused the injury complained of. He brought suit against the appellant, charging, in his declaration of two counts, first, that the accident was caused by defective machinery, known by the appellant to be defective, and second, was also caused by the incompetency of the hoister, or man who applied the steam power to hoisting the coal buckets. It was insisted that there was not one word of evidence offered to show that the appellant had any notice of any defect in any of the hoisting apparatus, and that no evidence was offered to show that the accident was occasioned by the incompetency of the hoister.

The jury made the following special findings:

First. Q. Was the plaintiff negligent in working under the bucket, while the bucket was being lifted above him?

A. No.

Second. Q. Did the defendant have actual notice that the bucket which caused the accident was defective? A.

Yes.

Third. Q. Did the plaintiff have notice that the bucket which caused the accident was defective? A. No.

Fourth. Q. Did the plaintiff make any examination of the bucket that caused the accident, before using the same?

A. No.

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Fifth. Q. Did plaintiff examine the latch on bucket, before the time of accident? A. No.

Sixth. Q. Was the bucket defective when the plaintiff worked with same, on the day before the accident? A. Yes.

Seventh. Q. Was the work of the plaintiff specially dangerous? A. No.

Eighth. Q. Was the plaintiff in the exercise of ordinary care and diligence at the time of accident? A. Yes.

Ninth. Q. Was the plaintiff in the exercise of more than ordinary care and diligence at the time of accident? A. No.

Tenth. Q. Was the plaintiff wholly free from negligence in what caused the injury? A. Yes.

Eleventh. Q. When the plaintiff went to work with bucket that caused the accident, was there anything in its condition, to give notice to him of any defect in same? A. No.

Twelfth. Q. Could the plaintiff by examination find defect in bucket that caused the accident? A. No.

Thirteenth. Q. Did the plaintiff have equal means with the defendant, of knowing about any defect in the latch on the bucket that caused the accident? A. No.

Fourteenth. Q. Did the plaintiff have better means than the defendant of knowing about any defect in the latch on the bucket that caused the accident? A. No.

Fifteenth. Was the plaintiff familiar with the use of the bucket that caused the accident? A. Yes.

Sixteenth. Was the plaintiff familiar with the use of the latch on the bucket that caused the accident? A. Yes.

APPELLANT'S BRIEF, DAVID FALES, ATTORNEY.

It may fairly be presumed that an employe knows the condition of materials, machinery or appliances where he has a constant opportunity to inspect the same, and which his regular duties bring under his notice. *Shearm. & Red. on Neg.*, 216; *St. Louis, etc., R. Co. v. Marker*, 41 Ark. 542; *T. W. & W. Ry. Co. v. Eddy*, 72 Ill. 138; *Chicago R. Co. v.*

Jackson, 55 Ill. 492; Chicago, etc., R. R. v. Clark, 11 App. Ct. 104; Duffy v. Upton, 113 Mass. 544; Perrigo v. Chicago, etc., R. R. Co., 52 Ia. 276; Mayes v. Chicago, etc., R. Co., 63 Ia. 562; Heath v. The Whitebreast Coal & M. Co., 65 Ia. 740; Mony v. Lower Vein Coal Co., 55 Ia. 673.

A servant is chargeable with actual notice of every fact which he would have known had he exercised ordinary care to keep himself informed as to matters concerning which it was his duty to inquire, and especially should this rule be applied where the servant's action is founded upon the assumption that the master ought to have known of something which he actually did not know. Shear. & Red, Neg., 217.

A servant who, with full opportunities of knowledge, works for any considerable length of time where there are dangerous defects, and does not make complaint or ask for repairs, is held to have assumed the risks involved. Shear. & Red. on Neg., Sec. 209.

BEACH & BEACH, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It is true that there is no direct evidence that appellant had any knowledge of any defect in the hoisting apparatus.

The question in this regard is, was the defect such that as between master and servant, under the surrounding circumstances, the master is charged with a knowledge thereof which the servant is not. The master is bound to use reasonable care in providing safe machinery, appliances, surroundings, etc., and the servant, in the absence of notice that the machinery, etc., is unsafe or defective, has a right to rely upon the discharge by the master of his duty in respect to these things. Wharton on Neg., Sec. 211; T. W. & W. Ry. Co. v. Fredericks, 81 Ill. 294; Wood on Master & Servant, Sec. 329; C. & E. I. R. R. Co. v. Hines, 132 Ill. 161-169; Elliott v. Hall, 15 L. R. Q. B. 315.

The servant is bound to take notice of what is before him

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and obvious to his senses. Wood on Master & Servant, Sec. 335.

Defects which could not be discovered save by the exercise of extraordinary care, the master is not charged with knowledge of; he does not insure the safety or soundness of his machinery. C. C. & I. C. R. W. Co. v. Troesch, 68 Ill. 545.

The master is presumed to have a knowledge of the principles upon which his machinery works, and therefore of the consequences likely to arise from defects of which he has notice. If an accident arise from a defect of which he had notice, he can not say that he did not think the defect to be of consequence. Wood on Master & Servant, Secs. 329 and 348.

A servant is chargeable with notice of what is apparent, but not necessarily that the apparent is dangerous.

He is chargeable with such knowledge of the character of what is apparent as, by his employment, he assumes to have, or from his education or experience he actually has.

When machinery operates upon scientific principles that are not obvious, a common laborer is not presumed to have knowledge of the principles of operation.

In the present case, the latch, by means of which the bucket was closed, opened and dumped, was constructed upon the principle that a force, pressing a latch at a right angle to a resisting surface, has a tendency to hold the latch against such surface; the effect of such pressure is obvious to most men, but a common laborer can not be presumed to understand the result that might follow if the angle, made by the latch with the resisting surface, became slightly obtuse. Feltham v. England, L. R. 2 Q. B. 46; McGowan v. La Plata Mining & S. Co., 3 McCrary, 393; Coombs v. New Bedford Cordage Co., 102 Mass. 573; O'Connor v. Adams, 120 Mass. 427; Smith v. Peninsular Car Works, 27 N. W. 662.

It is contended in the present case that, in consequence of wear, the angle made by the latch with the resisting surface had become obtuse; there was evidence tending to sustain such contention, and the jury have so found.

It is true that the plaintiff and defendant had equal opportunities for inspecting the bucket, and that there is no evidence that either had knowledge of the defect; but the defendant, as master, is charged with the duty of exercising reasonable care to see that the machinery provided is safe, and a servant has a right to rely upon the discharge of such duty; while the plaintiff, a servant, is only bound to take notice of such things as by the exercise of reasonable care he would have known. Wood on Master and Servant, Sec. 329; Wharton on Negligence, Sec. 211.

In the present case it is questionable if the plaintiff, a common laborer, had he known of the defect, would have understood that it was dangerous.

A knowledge of a defect, if he does not, or is not presumed to know it to be dangerous, will not defeat the claim of a servant for injury caused by such defect. Wharton on Negligence, Sec. 214; Patterson v. R. R. Co., 76 Penn. St. 389.

As to knowledge of the defect, this case turns upon the duty of the master to exercise reasonable care in providing safe machinery and the right of the servant to rely thereon, as opposed to the obligation of the servant to know of defects which, by reasonable care, he could have ascertained, and the question whether this plaintiff did or is to be presumed to have known the dangerous character of the defect. As to the facts bearing upon these things, the finding of the jury is against the defendant.

It is urged that the verdict, general and special, of the jury, is against the evidence.

We are not prepared to say it is such as we should have found; judging from the written record before us, we must say that we should have been better satisfied had it been for the defendant. We can not say that there is no evidence or that the evidence is not sufficient to sustain the judgment.

The case has been twice tried, two verdicts for the plaintiff have been found, and we see no reason for thinking that a third trial would result otherwise.

Barchard v. Kohn.

The plaintiff has been injured; the defendant is a corporation; that juries in such cases allow their sympathies to influence their judgment is notorious. We can not say that this verdict is the result of passion or prejudice, while we may, from our common knowledge, believe the personality of the parties had much to do with it.

We do not approve, entirely, of the course pursued with reference to the instructions to the jury, but we see no such error as requires a reversal of this judgment, or any by which we think the defendant was improperly prejudiced.

It appears that the case having once been tried, was again put upon trial before all other cases, having, it would seem, precedence over it on the calendar, had been tried.

That these other cases had not in some way lost their right to precedence does not appear; besides, a calendar is not a docket, within the meaning of Sec. 17, of Chap. 110, R. S. Titley v. Kaehler, 9 Ill. App. 537.

The judgment of the Circuit Court is affirmed.

Ira Barchard and H. C. T. Borrmann v. Josephine Kohn.

54	629
157	579
54	629
72	312

1. CHATTEL MORTGAGES—*Judgment Note—Extinguishment of Lien.*—A person took a judgment note, and to secure it, a mortgage on personal property. The note being unpaid, judgment was entered upon it and execution issued and levied upon the mortgaged property. A part of the property was set apart as exempt and the balance sold. *It was held*, that the levy of the execution extinguished the mortgage lien upon the goods so set apart as exempt.

2. REMEDIES—*When the Election of One Waives the Other.*—A mortgagor of chattels has two remedies: one by legal process against the property and the other by enforcing the mortgage. The election of one is a waiver of the other.

Memorandum.—Trespass for taking chattels, etc. Appeal from the Circuit Court of Cook County; the Hon. SAMUEL P. McCONNELL, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 30, 1894.

The opinion states the case.

APPELLANTS' BRIEF, JESSE HOLDOM, ATTORNEY.

It is contended that there was no foreclosure, because the defendant was pursuing a concurrent remedy at the time by an action at law upon the note. But a mortgagee has a right to do this. He may proceed concurrently with an action on his note and with lawful proceedings to foreclose his mortgage. This has been repeatedly held in regard to mortgages of real estate, and from the nature of the contract the rule is equally applicable to mortgages of personal property. *Ely v. Ely*, 6 Gray, 439; *Draper v. Mann*, 117 Mass. 439; *Heburn v. Warner*, 112 Mass. 271-273.

In *Mutual Mill Ins. Co. v. Gordon*, 20 App. Ct., on page 566, the court said: "The mortgage debt is the principal thing, and the mortgage but a mere incident of it. *Coffing v. Taylor*, 16 Ill. 457. The mortgagee may deal with the debt in the same manner as though it were unsecured. The vitality of the mortgage lien depends upon an existing indebtedness, and is an incumbrance upon the premises only to the extent of the subsisting indebtedness." *Thompson v. Mead*, 67 Ill. 395; *Wetsel v. Mayers*, 91 Ill. 497; *Frink v. Pratt*, 130 Ill. 333; *Finney v. Harding*, 32 Ill. App. 106; *Cunnea v. Williams*, 11 Brad. 78.

APPELLEE'S BRIEF, MORAN, KRAUS & MAYER, ATTORNEYS.

Borrmann waived his rights under the mortgage by putting the debt thereby secured in judgment, and causing execution issued thereon to be levied upon the mortgaged property. *Buck v. Ingersoll*, 11 Metc. 226; *Swett v. Brown*, 5 Pick. 178; *Legg v. Willard*, 17 Pick. 140; *Libby v. Cushman*, 29 Me. 429; *Whitney v. Farrar*, 51 Me. 418; *Kimball v. Marshall*, 8 N. H. 291; *Haynes v. Sanborn*, 45 N. H. 429.

Under the law of this State, a chattel mortgage is but a conditional sale, and when the mortgagor fails to perform the condition, the title to the mortgaged property, so far as it is held by the mortgagor, vests in the mortgagee. *Rhines v. Phelps*, 3 Gilm. 455; *Pike v. Colvin*, 67 Ill. 227; *Durfee v. Grinnell*, 69 Ill. 371.

Barchard v. Kohn.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

June 16, 1890, William Kohn, husband of the appellee, gave to H. T. C. Borrmann, one of the appellants, a chattel mortgage, to secure the payment of twenty-nine judgment notes. Kohn paid eleven of them, and March 19, 1891, Borrmann entered judgment against Kohn upon the others, took out execution, and levied upon the mortgaged chattels.

The chattels, which are the subject of this suit, were, under statutory proceedings, set off to Kohn as exempt from execution. Then they were turned over to appellee, and with them husband and wife occupied a store in which a sign with her name upon it hung from a lamp. The chattels not set off as exempt were sold under the execution, and Borrmann received the proceeds—less prior executions of other parties—satisfying a little more than half his debt.

April 13, 1891, the appellants, Borrmann and Barchard, the latter being a constable, went to the store claimed by the appellee as her own, and took the chattels under the mortgage. For that act this suit is brought.

The real question now is whether the levy of the execution extinguished the mortgage. There can be no doubt that it did as to the mortgaged property sold under the execution, but as to the portion set off as exempt, there is more difficulty.

From the mortgage Kohn could not claim any exemption. True, the mortgage had run out early in March, 1891, but it was still valid against him (unless extinguished by the levy), and whether she was in fact a purchaser, if material, was a question for the jury. *Fuller v. Paige*, 26 Ill. 358. For the appellee the court instructed the jury that the levy extinguished the mortgage, and that the duty of the jury was to find the appellants guilty; that the only question for the jury to decide was the amount of damages which the appellee was entitled to.

If the mortgage was extinct this instruction was correct, for if the appellants were mere wrong-doers, they could not question whether her ostensible purchase of the property was in good faith or not. *Pulver v. Rochester Ger. Ins. Co.*,

35 Ill. App. 24. The ground upon which a levy upon the mortgaged property under legal process for the same debt that is secured by the mortgage, is held to extinguish the mortgage is stated, with a collection of authorities in Dyckman v. Sevaton, 39 Minn. 132. The two remedies, by legal process against the mortgaged property, and by enforcing the mortgage, are inconsistent, and the election of one is a perpetual waiver of the other. There are cases to the contrary. Byran v. Stout, 127 Ind. 195.

In the absence of authority on the point in this State, we follow the current, and hold the election conclusive.

The actual damages to the appellee that are capable of mathematical computation, are sworn to be \$483. In addition there is necessarily loss by interruption of business. The verdict and judgment are \$800. We can not say that the damages are outrageous or excessive, the case being one in which it was a fair question before the jury whether vindictive damages should be awarded.

The judgment is affirmed.

54	632
60	488
54	632
59	405

Venice C. Seaver v. Ferdinand Siegel.

1. JUDGMENT BY CONFESSION—*Waiver of Errors*.—Judgment by confession having been entered against appellant upon a lease, he appeared and asked that it be set aside; the court allowed him to plead to the declaration. He then filed a demurrer, which, being overruled, the court ordered that the judgment should stand as final, unless the defendant should further plead. He elected to stand by his demurrer and prayed an appeal. *It was held*, that the cognovit filed in the case waived all errors.

2. SAME—*Courts of Law Exercise Equitable Jurisdiction*.—Courts of law exercise an equitable jurisdiction over judgments by confession, and on application to set such judgments aside some equitable ground should be shown.

Memorandum.—Judgment by confession. Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 30, 1894.

The opinion states the case.

Leavitt v. Kennicott.

LUTHER LAFLIN MILLS and JOHN MCGAFFEY, attorneys for appellant.

WILLOUGHBY & BINSWANGER, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Judgment by confession for the sum of \$570, having been entered against appellant upon a lease, he appeared and asked that a judgment be set aside; thereupon the court allowed him to plead to the declaration filed in the cause; appellant then filed a demurrer, which demurrer being overruled, he filed a written motion to set aside the order overruling his demurrer; the court refused to grant such motion, and ordered that the judgment heretofore entered should stand as final, unless the defendant should further plead. Appellant elected to stand by his demurrer, and prayed an appeal from the judgment by confession entered as aforesaid.

The cognovit filed in this case contains a waiver of all errors.

All the exceptions urged against the judgment were but errors and were waived. *Hall v. Jones*, 32 Ill. 38; *Frear v. The Commercial Natl. Bank*, 73 Ill. 473; *Hall v. Hamilton*, 74 Ill. 437.

Courts of law exercise an equitable jurisdiction over judgments by confession, and on application to set such a judgment aside some equitable ground should be shown. *Stahl v. Shipp*, 44 Ill. 133.

None is shown here and the judgment is affirmed.

Michael B. Leavitt v. Bruno Kennicott.

1. CONTINUANCE—*After Trial Begun.*—After a jury had been impaneled and the trial begun, counsel for appellant asked for a continuance because of the absence of his client, a material witness. *It was held*, there was no error in refusing to then continue the cause.

54	633
157	235
54	633
189	290

2. EVIDENCE—*Instruments Rejected Must be Preserved in a Bill of Exceptions.*—A party seeking to preserve an exception to the rejection of a writing or signature to it, must incorporate the instrument in a bill of exceptions.

Memorandum.—Assumpsit for labor and services. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 30, 1894.

The opinion states the case.

CASE, HOGAN & CASE, attorneys for appellant.

ALLAN C. STORY, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action by appellee to recover damages for having been, as he alleged, wrongfully discharged from the services of appellant. The plaintiff obtained a judgment from which the defendant prosecutes this appeal.

After a jury had been impaneled and the trial begun, counsel for appellant asked for a continuance because of the absence of appellant, a material witness. There was no error in refusing to then continue the cause.

Appellee was properly allowed to testify when the season in this city begun and closed at the theater in which appellee was employed. In the abstract appeared the following:

Q. You filed a bill in chancery? A. Yes, sir.

Q. That is your signature, isn't it?

Objection by plaintiff sustained. To which ruling of the court counsel for defendant then and there excepted.

This occurred upon cross-examination of the plaintiff. The question objected to was proper only upon the theory that appellant intended, by introducing the paper it was believed the witness would testify he signed, to impeach the testimony the witness had already given; and this appellant avowed to be his object. The bill or paper concerning which the question was asked, is not shown in the bill of exceptions, and it is therefore impossible for us to say that any-

Delfosse v. Thomas.

thing contained therein would have tended in any way to discredit or contradict the plaintiff, or have any bearing upon the case on trial.

The jury were fairly instructed. Some slight errors may have occurred during the trial, but we find none of such gravity or so prejudicial to appellant as to require a reversal of the judgment rendered in this case, and it is affirmed.

Antoine Delfosse v. Marcellus Thomas.

1. JUDGMENTS—*Reversal of—Preponderance of Evidence.*—The Appellate Court will not reverse judgments merely because upon reading the record the evidence does not seem to preponderate in favor of the party in whose favor the finding was; something more than this must be shown.

Memorandum.—Assumpsit for wages. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 30, 1894.

F. H. TRUDE, attorney for appellant.

OSCAR E. LEINEN, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action brought by appellee to recover a balance of wages claimed to be due to him.

The cause was brought in a justice court; appellee there recovered judgment. On appeal to the Superior Court appellee was again successful.

It is perhaps the case that each of these judgments was unjust; the appellant certainly does not appear to have made a merely vexatious defense. Judging from the record before us, appellee does not seem to have a preponderance of the evidence, but we do not reverse judgments merely because upon reading the record the evidence does not seem

to preponderate in favor of the party in whose favor the finding was; something more than this must be shown.

This is all that appears here, and the judgment of the Superior Court must be affirmed.

William Davidson v. J. H. Colburn.

1. APPELLATE COURT PRACTICE.—*Preponderance of Evidence*.—The Appellate Court does not reverse judgments merely because it does not agree with the court below as to where the preponderance of the evidence lies.

Memorandum.—Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 30, 1894.

ELDREDGE & FINCH, attorneys for appellant.

MUNN & MAPLEDORAM, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The question in this case is entirely one of fact. The writer of this opinion is inclined to believe that the preponderance of the evidence is in favor of appellee. (The other members of the court think otherwise.) This court does not reverse judgments merely because it does not agree with the court below as to where the preponderance of the evidence lies.

After a careful examination of the record, we see no sufficient reason for interfering with the judgment rendered in this cause, and it is affirmed.

Edmond Lavis v. Wisconsin Central Railroad Company.

1. PLEADINGS—*Actions for Personal Injuries*.—In actions against carriers for injuries to passengers, it is necessary to allege the negligence in general terms only, and not to set out the facts constituting the neg-

54a 636
68 577

54b 636
54 214
54b 636
57 536

54b 636
81 332

Lavis v. Wis. Cent. R. R. Co.

ligence complained of. An allegation specifying the act constituting the injury, and alleging that it was negligently and carelessly done, is sufficient.

2. *SAME—Sufficiency of the Allegation of Negligence.*—In actions against carriers for injuries to passengers, a declaration which charges that the negligence consists of negligently running and operating its road and the cars propelled thereon, is sufficient.

3. *SAME—Statement of Ultimate Facts Sufficient.*—For the purpose of pleading, the ultimate fact to be proven need only be stated. The circumstances which tend to prove the ultimate fact are evidence; they have no place in the pleadings.

4. *COMMON CARRIERS OF PASSENGERS—Sufficiency of Proof in Actions Against.*—A passenger in a railroad car has only to show the accident, and that he received an injury, to make a *prima facie* case of negligence. When this is done, the burden of explaining is thrown upon the carrier.

5. *SAME—Rights of Passengers.*—A passenger has the right, while on his journey, to go from his seat to the water-closet of the car in which he is riding, and while so going, to be protected against being thrown out of the car through an open doorway.

6. *NEGLIGENCE—A Question of Fact.*—Negligence is a question of fact and not of law. It is the fact to be found. The acts of the party and the circumstances under which they are done, are not the facts to be found, but are merely evidence of it.

Memorandum.—Action for personal injuries. Error to the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed April 30, 1894.

The opinion states the case.

BLACK & FITZGERALD and W. S. JOHNSON, attorneys for plaintiff in error.

GREGORY, BOOTH & HARLAN, attorneys for defendant in error.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was an action to recover for a personal injury to the plaintiff, who, on the evening of Sunday, October 28 1888, was being carried as a passenger, in a passenger train of the defendant, on its line of railroad, from Chicago to Austin, a suburb of Chicago.

At a point on the railroad, a short distance before the station of Austin is reached, occurs a reverse curve in the road, described by witnesses as a sharp double curve, resembling an elongated letter S.

During the trip, and shortly after the last station before reaching Austin was passed, the plaintiff got up from his seat, which was near the center of the car, and started to walk to the water-closet at the rear end.

He testified that the rear door of the car seemed to be swinging as he approached it; that he was walking along easily, and that just as he got near the door and probably three feet from it, the car seemed to strike the curve, and gave a sudden lurch that threw him out of the open door and across the brake, breaking two of his ribs; that he fell to the platform and caught the railing, on the end of it, with both hands, and hung on for quite a distance, his feet hanging off the platform; that then a lurch of the car in the opposite direction threw him to the ground, and the wheels of the next car took off his left leg and right foot except the heel. He also testified that there had been several lurches of the car on the trip, but that the first one that occurred after he left his seat was the one that threw him out.

Mrs. McCormick was a passenger on the same train and sat in the car next behind that in which plaintiff rode. She testified that she sat next to the front window of the car, on a seat running lengthwise, and was looking through the window directly toward the car ahead of her out of which the plaintiff came; that the first she saw of the plaintiff was when he was five or six feet from the door and was coming toward it; that the door opened and he was pitched out head first, screaming as he went, his hands striking first the casing of the door and then the brake; that he struck the round top of the brake and fell; that the brakeman, who made announcement of stations, was standing with his arms on the door looking in the direction of the car out of which the plaintiff came; that he and her husband, who was sitting next to her, immediately ran out on the platform; that the brakeman came back into the car directly afterward, but gave no signal to

stop the train, though she asked him why he did not; that the speed was not slackened, and the train ran right along to the next station; that the train was jerking all the way, sometimes running smoothly and then giving a jerk, and that the plaintiff was thrown out at the time the car struck the first curve of the reverse or double curve, and that the train in her opinion was running at twenty-five or thirty miles an hour.

Jacob P. Hohmann, a policeman, testified that upon the arrival of the train at Austin he was informed of the accident, and at once went down the track to where he found the plaintiff lying between the double tracks with one foot hanging a little by the skin of the heel, and the other crushed; that about two hundred feet back and east of where the plaintiff was lying, he found his hat, and that it could be seen by marks on the gravel that the body had been dragged in the neighborhood of that distance; that the hat was right at the beginning or east end of the second curve which began at the west end of the first curve, and the body was at the west end of the second curve.

The train passed on from Austin to Harlem, which was the end of its trip, a distance not ascertainable from the abstract of the record, but from observation believed to be two or three miles from the place of the accident, and from there returned to Chicago.

An offer was made to prove by one Perley, that when the train reached its destination, the engineer procured from a neighboring saloon a billiard cue with which he plugged up some opening in the engine, which was objected to on the ground that there was no proper foundation therefor in the declaration, and the objection was sustained.

After some additional counts were filed, one of which was framed in order to fit the offered testimony of said Perley, the plaintiff, in the absence of said Perley, offered to prove by a witness, named Richardson, that upon the arrival of the train at Harlem he saw the engineer of the engine working about the engine and plugging it in some way with a billiard cue; and it was thereupon agreed by defendant's

counsel that Richardson would so testify, and that for the purposes of the motion to be made by defendant, he should be regarded as having so testified.

The plaintiff's case being then closed, the court, upon the defendant's motion, instructed the jury that "under the evidence" the plaintiff was not entitled to recover, and directed a verdict in favor of the defendant.

There are indications in the record of much controversy over the pleadings in the case. Whether the court ruled correctly upon such questions need not be discussed, inasmuch as the instruction that was given was equivalent to an instruction that, under the evidence, no recovery could be had upon any condition of pleadings. The original declaration and the first additional count thereof charged that the defendant by its servants in disregard, etc., "suddenly caused said train to be given a very violent jerk, by means whereof," etc. That was a sufficient allegation of negligence. The addition to that allegation of the words, "by means of the engine being started afresh, or by some other means unknown to plaintiff," added nothing to the allegation of negligence, and might have been treated as surplusage.

We are aware of an increasing tendency in actions of this kind to go into much greater detail in the declaration than is necessary in stating the manner or particulars of the alleged negligence.

The most approved precedents in cases of actions against carriers for injuries to passengers, allege the negligence in general terms only. *Curtis v. Drinkwater*, 2 Barn. & Adol. 169 (522 Eng. Com. Law, 79); *Carpue v. London & Brighton Ry.*, 5 Adolph. & Ellis, N. S. 747 (48 E. C. L. 746); *North Chicago Street Ry. Co. v. Cotton*, 140 Ill. 486.

In this last cited case the first count of the declaration—a most general one—was approved in the following words:

"The circumstances of the injury do, in our opinion, give presumptive evidence of at least the specific negligence charged in the first count of the declaration. That charge, as we have seen, is very general, and consists of negligently running and operating its road, and the cars propelled thereon."

In 2 Thompson on Negligence, 1247, it is said:

“It is not necessary to set out the facts constituting the negligence complained of. An allegation specifying the act constituting the injury, and alleging that it was negligently and carelessly done, is sufficient.”

Tested by the above rules, the counts of the declaration referred to were sufficient to support the *prima facie* case made by the evidence.

Upon whom did the burden devolve of explaining what it was that occasioned the lurch or jerk that threw the plaintiff out of the car?

The law of this State, as declared in the case of G. & C. U. R. R. Co. v. Yarwood, 15 Ill. 468, and reiterated in the same entitled cause in 17 Ill. 509, and ever since adhered to, is that a passenger in a railroad car need only show the accident, and that he has received injury, to make a *prima facie* case of negligence against the carrier.

It was there said:

“By the law they (passenger carriers) are bound to the utmost diligence and care, and are liable for slight negligence. Proof that defendant (in the Supreme Court) was a passenger, the accident and the injury, make a *prima facie* case of negligence. This is done, and the burden of explaining is thrown upon the plaintiffs.”

The case of North Chicago Street Ry. Co. v. Cotton, *supra*, contains the latest affirmation of the rule so stated, of which we are aware. It is there said:

“The evidence of the injury to the plaintiff and the circumstances under which it was inflicted, were, alone, sufficient to raise a presumption of negligence on the part of the defendant. * * * The general rule seems to be, that proof of an injury occurring as the proximate result of an act which, under ordinary circumstances, would not, if done with due care, have injured any one, is enough to make out a presumption of negligence. * * * In many cases it has been held, that, in a suit by a passenger against a carrier for an injury, the mere proof of the accident by which the injury was occasioned is sufficient to throw the burden

on the carrier to show that he exercised due care; and there seems to be a very general concurrence of authority, that, where there was an absence of *vis major*, and it is shown that the injury happened from the abuse of agencies within the defendant's power, it will be inferred from the mere fact of the injury that the defendant acted negligently. See 2 Wharton on Negligence, Sec. 661, and cases cited in notes. In this State the doctrine as to presumptions above referred to, has been fully recognized in repeated decisions." And then follows a reference to R. R. Co. v. Yarwood, *supra*, and other decisions.

In the case of Carpue v. London and Brighton Ry., *supra*, Lord Denman told the jury:

"It having been shown that the exclusive management, both of the machinery and the railway, was in the hands of the defendants, it was presumable that the accident arose from their want of care unless they gave some explanation of the cause by which it was produced; which explanation the plaintiff, not having the same means of knowledge, could not reasonably be expected to give."

A passenger has the right, while on his journey, to go from his seat to the water-closet of the car in which he is riding, and while so going, in care, to be protected against being thrown out through an open doorway, by conditions within the control of the carrier.

Whatever valid excuse may have existed for such a condition of things as resulted in his being thrown out, under such circumstances, must be shown by the carrier, and when shown it would make a question for the jury as to its sufficiency.

Negligence is a question of fact, and not of law. "Negligence is the fact to be found. The acts of the party, and the circumstances under which they were done, are not the fact to be found, but are merely evidence of that main fact." G. & C. U. R. R. Co. v. Yarwood, 17 Ill. *supra*; C. & N. W. R. R. Co. v. Traves, 33 Ill. App. 307.

"For the purposes of pleading, the ultimate fact to be proven need only be stated. The circumstances which tend

Culver v. Schroth.

to prove the ultimate fact can be used for the purposes of evidence, but they have no place in the pleadings." *McAllister v. Kuhn*, 96 U. S. 87.

The same principle is applied in the case of *Indianapolis R. R. Co. v. Horst*, 93 U. S. 291.

Whether the engine was out of repair, or the train was being run at too high a rate of speed around the curve, or whatever the cause of the accident, resulting from the operation of the train or the abuse of agencies within the defendant's power, the plaintiff observing due regard for his own safety, was something that the plaintiff need not have concerned himself about, either in his pleadings or in his proof of a *prima facie* case.

The relation of passenger and carrier, the accident, without fault of the plaintiff, by a sudden lurch or jerk of the car, and the injury, were shown, and a *prima facie* case of negligence, on the part of the defendant, was thereby made out, and it was error to take the case from the jury, by a peremptory instruction that "under the evidence" the plaintiff could not recover.

There are other elements which we do not, and probably should not, pass upon at this time, holding, as we do, that the cause must be remanded for another trial.

The judgment of the Superior Court will therefore be reversed and the cause remanded.

Ella J. Culver v. C. F. Schroth and Henry Ahrens.

1. APPELLATE COURT PRACTICE—*Insufficient Transcript*.—Transcripts "as per præcipe" are insufficient.

2. SAME—*Res Adjudicata*.—A former decision of this court in a case is the law of the case for this court.

Memorandum.—Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 30, 1894.

The opinion states the case.

54	643
57	343
153	437

LOUIS BOISOT, JR., attorney for appellant.

PEASE & McEWEN, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Had a complete transcript of the record from the court below been filed, it would probably have appeared that the appellant, a purchaser *pendente lite*, and therefore bound by all the former proceedings in the cause (*Williams v. Winans*, 20 N. J. Eq. (5 C. E. Green) 392), is now seeking to have this court reverse its decision in this same case on a former appeal. *Schroth v. Black*, 50 Ill. App. 168.

That former decision is the law of the case for this court. *C. M. & St. Paul Ry. Co. v. Hoyt*, 44 Ill. App. 48.

But by a praecipe for part only of the record, followed by the clerk in making up and certifying the transcript "as per praecipe," the object of this appeal is not so apparent.

We have so often held that transcripts "as per praecipe" are insufficient, that we will not repeat the reasons. *Wilkinson v. Linden Steel Co.*, 35 Ill. App. 448; *Alling v. Wenzell*, 46 Ill. App. 562. These cases having been many times followed since.

Not having before us the complete case as the Circuit Court had it, we do not know whether any error was committed or not, and therefore affirm the decree.

54 644
154s 627

Lyman E. Crandall v. John Barton Payne.

1. ASSUMPSIT—*Money Due upon the Happening of an Event.*—Where a payment is to be made upon the happening of an event, suit can only be brought after the event upon which the payment depended has happened.

Memorandum.—Assumpsit. Error to the Circuit Court of Cook County; the Hon. SAMUEL P. McCONNELL, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed March 29, 1894.

The opinion states the case.

Crandall v. Payne.

BRIEF OF PLAINTIFF IN ERROR, C. STUART BEATTIE,
ATTORNEY.

The action for money had and received is an equitable action. It lies whenever one has received money which *ex equo et bono* belongs to another. Pells v. Snell, 31 App. Ct. 164; Taylor v. Taylor, 20 Ill. 650; Alderson v. Ennor, 45 Ill. 128; Belden v. Perkins, 78 Ill. 449.

DEFREES, BRACE & RITTER, attorneys for defendant in error.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

A complicated real estate trade was in progress between others than the parties to this suit, pending which money was placed by them in the hands of the defendant in error upon terms expressed in writing, as follows:

"It being understood that \$1,000, of the \$5,000 herein mentioned, is going to L. E. Crandall, it is understood that said \$1,000 is to be retained by said Payne until the matter of said lots and farm is closed, not exceeding said fifteen days.

Dated April 14, 1891."

The plaintiff in error was no party to the trade, but the title to the lots was to come from him to one of the parties. He does not seem to have been in fault, and yet between the parties "the matter of said lots and farm" was never "closed." His argument now is "that this was to be done within fifteen days, but whether or not done within that time, plaintiff in error was not to suffer; the \$1,000 was to be paid to him at the expiration of the fifteen days at all events."

There was no contract between him and anybody as to this money, and conceding that he might sue for money had and received by a stranger who had received money to be paid to him, yet he could only sue after the event upon which the payment depended had happened. That event could never happen so long as "the matter" was not "closed," however stringent the arrangement between the parties as to the time in which it should happen.

The judgment is affirmed.

Simon Pick v. Louis Glickman.

54	646
51	578
54	646
67	1106

1. **MOTION—Practice on.**—There is no statute or practice which requires a motion, or notice thereof, based upon affidavits, to specify the cause for the motion, which the affidavits show.

2. **NOTICE—To an Attorney.**—Notice to the attorney is notice to his client.

3. **ATTORNEYS—Implied Authority.**—The authority to collect money and give acquittance therefor, carries with it the duty to protect judgments recovered for that purpose.

Memorandum.—Appeal from an order overruling a motion to set aside a verdict and judgment rendered in the plaintiff's absence by the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1893, and reversed and remanded. Opinion filed March 29, 1894.

ISRAEL COWEN, attorney for appellant.

EDWARD A. FISHER, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Pick sued Glickman and recovered before a justice, and Glickman appealed to the Circuit Court. There the case was tried *ex parte* on the 17th day of April, 1893, which day was the first day of the April term, and Pick obtained a verdict on which judgment was entered. On the 27th day of May, which was in the May term, that judgment was, on motion and due notice to the attorney of Pick, set aside. The terms of the notice and motion are not set out, as no question can be made upon them.

Now, assuming that such motion and notice—being a statutory substitute for a common law proceeding which, without a bill of exceptions, would be of record—are a part of the record without such bill; the cause for setting the judgment aside only appears by affidavits, which are but a substitute for the evidence that would not be a part of the record without such bill, and there is none in this case. There is no statute or practice which requires a motion, or

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notice thereof, based upon affidavits, to specify the cause for the motion which the affidavits may show; and it will be more just to require a party who has been duly notified, to appear and except to action of the court, to which he does not assent, than to permit him after being silent in the Circuit Court, to object for the first time here.

Notice to the attorney was notice to Pick; the authority to "collect the money and give acquittance therefor" (Custer v. Agnew, 83 Ill. 194), carries with it the duty to protect the judgment.

We can not review the setting aside of the judgment. June 7, 1893, the cause was again tried *ex parte*, this time only Glickman appearing, and he recovered affirmatively a judgment upon a set off. This is error. Morgan v. Campbell, 54 Ill. App. 242. As each party has now taken the other by surprise once, the case will be returned to the Circuit Court for a fair contest. Reversed and remanded.

**Louisa E. Brown v. The American Stone Press Brick
Manufacturing Company, John M. Dunphy, M. D.
Coffeen, Mellie B. Coffeen, F. H. Herr and
The Belmont Loan and Building
Association.**

54 647
67 316

1. **APPEAL—On Dismissal of a Bill for an Injunction.**—Where, in a bill in chancery, the only remedy sought is an injunction, the dissolution of the injunction is in effect a final order, denying all relief sought. The complainant may dismiss the bill and appeal. In such case the appeal will bring up the question of the propriety of the order of dissolution.

2. **EXCEPTIONS—Not Necessary in Chancery.**—Exceptions to the action of the court are not necessary in chancery practice.

3. **INJUNCTION—When an Order of Dissolution is not Final.**—When a bill prays for relief other than by injunction, and without such other relief the injunction would be useless, the order of dissolution is not final.

4. **CHANCERY PRACTICE—Order Dismissing the Bill Implies What.**—An order dismissing a bill for want of equity involves the idea that the court has considered the bill and finds no equity in it.

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5. COSTS—*On an Order Ex Gratia.*—Where an order *ex gratia* is made in the Appellate Court it may award costs to the adverse party.

Memorandum.—Bill for injunction. Error to the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1894, and decree modified. Opinion filed March 26, 1894.

The opinion states the case.

BRIEF OF PLAINTIFF IN ERROR, L. E. MILLER AND SELDEN
FISH, ATTORNEYS.

The motion to dissolve the injunction for want of equity on the face of the bill amounts to a demurrer and necessarily admits all the allegations of the bill to be true. *Weaver v. Payer*, 70 Ill. 567; *Vieley v. Thompson*, 44 Ill. 9.

BRIEF OF DEFENDANTS IN ERROR, WILBER, ELDRIDGE &
PINNEY, ATTORNEYS.

The dissolution of an interlocutory injunction being discretionary, is not error when the bill seeks other relief. Such order is appealable only when the injunction is the sole relief sought, no other remedy being asked for. *Titus v. Maybee*, 25 Ill. 232; *Marble v. Banhotel*, 35 Ill. 240; *Higgins v. Bullock*, 73 Ill. 205; *C., B. & Q. R. R. v. Cole*, 75 Ill. 591; *Hummert v. Schwab*, 54 Ill. 142; *Gillett v. Booth*, 6 Brad. 423; *Farrell v. McKee*, 33 Ill. 226; *Elgin City Banking Co. v. Eaton*, 3 Brad. 432.

It is error to grant an injunction on bill where it is not asked specifically in prayer for relief, and also in prayer for process. *High on Injunction*, Sec. 1593; *Primmer v. Patten*, 32 Ill. 528; *College C. & R. C. v. Moss*, 72 Ind. 139; *Jefferson v. Hamilton*, 69 Ga. 401.

Injunction being a harsh remedy, a clear case requiring it must be made out; positive knowledge of facts showing how and why irreparable injury will ensue without injunction. Argument, inference or belief of injury is not sufficient; positive averment of matters, not fears of complainant. The court must know circumstances showing

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irreparable injury. High on Injunction, Sec. 1589; Plough v. Boyer, 38 Ind. 113; Cook v. Miller, 26 Ill. App. 421; McHenry v. Jewett, 90 N. Y. 58; Goodwin v. N. Y. & N. H. R., 43 Conn. 494; Bogert v. Haight, 9 Paige, 297; Perkins v. Collins, 2 Green's Ch. 482.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Plaintiff in error filed in the Superior Court a bill setting forth the obtaining from her by fraudulent practices of certain certificates for stock in a building and loan association.

The bill asked that the holder of the certificate be enjoined from transferring the same, and offering, if the court thought she ought, to surrender what she had received therefor; asked that the certificate be returned to her. A preliminary injunction having been granted, the same was, on motion of the defendants, dissolved, whereupon, as appears from the record, upon motion of the complainant, the bill was dismissed for want of equity.

Thereupon the complainant sued out a writ of error. Had the bill been purely an injunction bill, that is, had the only remedy sought been an injunction, after the dissolution of the injunction, that being in effect a final order, denying all relief sought, the complainant might have dismissed her bill and appealed or taken out a writ of error; such appeal or writ would in such case have brought up the question of the propriety of the order of dissolution. Titus v. Maybie, 25 Ill. 257. And this without the taking of an exception. Exceptions to the action of the court are not necessary in chancery.

The bill in the present case, asking, as it did, for relief other than by injunction, and it being manifest that other relief was necessary to the complainant—indeed, that without other relief the injunction would be useless, the order of dissolution can not be considered a final one.

The bill presents a case of great and we may say cruel imposition. If the things therein alleged are true, the complainant ought to find a remedy. Whether, as the case now

stands, she has any, we are not called upon to say; it may be that the building and loan society, having notice of her claims, would not be protected in recognizing any person other than the complainant as the owner of the certificate.

The motion of complainant to dismiss the bill for want of equity, seems to have been a mistake. A complainant does not, understandingly, dismiss his bill for want of equity; if he dismiss when there has been no hearing, as in this case, he ordinarily dismisses without prejudice.

An order dismissing a bill for want of equity involves the idea that the court has considered the bill and finds no equity in it.

In the present case, no pleading had been filed by any of the defendants; no evidence had been heard; the court therefore considered only the propriety of maintaining the injunction.

Under the circumstances the bill should not have been dismissed for want of equity.

The abstract filed by plaintiff in error is insufficient, being as to much of the record a mere index.

This being an equity case, this court will modify the decree by ordering that the dismissal of the bill be without prejudice.

This order being *ex gratia*, the defendants in error will recover their costs in this court. *Sexton v. Chicago Storage Co.*, 30 Ill. App. 95.

Decree modified.

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George A. Whitcomb v. Alice A. Duell and Laura A. Baldwin.

1. QUESTIONS OF FACT—*Findings of a Master*.—The findings of a master in matters referred to him, is as conclusive upon the parties as the verdict of a jury in a civil case, and will be reviewed only for the same reasons that a verdict will be.

Memorandum.—Foreclosure proceedings. Appeal from the Circuit

Whitcomb v. Duell.

Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded with directions. Opinion filed April 30, 1894.

The opinion states the case.

ANDREWS, MILLER & GETTYS, attorneys for appellant.

MATZ & FISHER, attorneys for appellee Alice A. Duell.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is a bill filed by the appellant to foreclose a mortgage made by Duell to O. F. Woodruff to secure her note to him, which note Woodruff assigned to the appellant. The defense was that the note was given without consideration, which, if true, is conceded to be a good defense to this foreclosure suit. *Mullanphy v. Schott*, 135 Ill. 655; *Scott v. Magloughlin*, 133 Ill. 33.

On a reference to a master he found that the note was given for a consideration. The court sustained exceptions to the report and dismissed the bill. The case is presented to us exactly as it was to the Circuit Court. The judge there did not see the witnesses—did not hear them testify—so that there is no presumption in favor of the decision there, based upon better opportunity of judging of credibility.

That Woodruff had been the attorney of Duell in a great deal of litigation is proved without denial; that he had been paid for his services, except in one suit, is not pretended; that his services in other cases were very considerable is proved; that she wanted further services which he declined to render without a settlement, both she and he testify; and that as a result this note was executed, is also proved by both of them. Under all the evidence shown by the record the terms and amount of the note were not ungenerous toward her. On all disputed questions of fact “where there is evidence tending to establish the facts found, neither the court of chancery, nor the Supreme Court on appeal, will review the findings in regard to the weight to be given to the testimony.” “The finding of a master in matters re-

ferred to him, in regard to the facts established by the testimony, is as conclusive upon the parties as the verdict of a jury in a civil cause, and will be reviewed or set aside only for the same reasons that a verdict would be." *Howard v. Scott*, 50 Vt. 48.

This rule was not observed in this case and the decree is reversed, and the cause remanded with directions to vacate the order sustaining the exceptions to the master's report, and overrule them, and enter a decree in accordance with the report.

John Brandner v. Jacob Krebs.

1. **GUARANTY**—*Essentials of the Contract*.—To put a party in the position of guarantor, it is essential that the person to whom the credit is to be given must himself be liable.

2. **NEW TRIAL**—*Motion for, Confined to Grounds Stated*.—Upon a motion for a new trial, assigning as the only ground that "the judgment is contrary to the law and the evidence, affidavits of new witnesses are not admissible.

Memorandum.—Assumpsit for physician's services. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 30, 1894.

The opinion states the case.

KICKHAM SCANLAN and EDGAR LEE MASTERS, attorneys for appellant.

FRANK W. BLAIR, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

February 21, 1893, two men, one the brother of the appellant, and another named Plesher, were hurt by the fall of a scaffold at a building where they were at work.

The appellee, a physician and surgeon, rendered services

Camp v. Unger.

in the line of his profession to Plesher, and the question in the case is whether the services were rendered at the request, and upon the promise, express or implied, of the appellant to pay for them.

That Plesher was unconscious is not disputed, and the preponderance of the evidence is that the appellant sent a messenger for a doctor, and the messenger brought the appellee, and that after he came, the appellant, in some form of words which is stated variously by the different witnesses, undertook that the appellee should be paid.

The appellant insists that if he incurred any liability, it was only that of guarantor, and that there being no writing, he is protected by the statute of frauds. But to put him in the position of guarantor, it is essential that Plesher should have been liable to the appellee. Brandt, Sur. & Guar. 56, *et. seq.*; Geary v. O'Neil, 73 Ill. 593.

Plesher was unconscious when the appellee came to attend upon him, and although the services were for his benefit, and part of them rendered after he regained consciousness, yet there is not a syllable in the evidence indicating that anybody interested ever had a thought that he was liable. The finding of the court, without a jury, that the appellant was the party to whom alone credit was given, can not be disturbed.

The motion for a new trial assigned as the only ground that "the judgment is contrary to the law and the evidence." Upon such a motion affidavits of new witnesses are not admissible, and therefore those filed are not considered, further than to say that even if newly disclosed evidence had been ground of the motion, the affidavits would have been unavailing. The judgment is affirmed.

Arthur B. Camp and Charles M. Stephens v. Nettie S. Unger.

1. DEMAND—*Not Necessary, When.*—No demand for property is necessary after an actual conversion.

2. LIEN—*Does Not Pass to Third Party on Discharge.*—Where a

livery stable keeper had a lien upon property in his keeping, which was paid off by a constable having an execution against the reputed owner, it was held that the lien did not pass to either the constable or the plaintiff in execution, and was no impediment to an action in trover by the real owner.

Memorandum.—Trover. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 30, 1894.

The opinion states the case.

APPELLANTS' BRIEF, NEWELL & CAMP, ATTORNEYS.

The taking by levy under execution of property not that of the person named in the writ, is not a conversion on the part of the judgment creditor in whose favor such execution issued, unless it be shown that such creditor participated in some manner in such taking. The appellant is neither morally nor technically responsible for departure from the command of the writ, unless he advised or assisted the officer therein. Cooley on Torts, 129; Syndacker v. Brosse, 51 Ill. 375.

APPELLEE'S BRIEF, ST. JOHN, FRENCH & MERRIAM,
ATTORNEYS.

The removal and retention of the property of a stranger by an officer, acting by direction of the party, is a conversion by both, aside from any demand and refusal. Calkins v. Lockwood, 17 Conn. 154; Gilman v. Healey, 36 N. H. 311.

If one wrongfully uses or sells the goods of another, it is a direct conversion, and no demand or offer to pay charges is necessary before bringing action. Dudley v. Sawyer, 41 N. H. 326; Peas v. South, 61 N. Y. 477.

There is no question as to the liability of an officer who takes the goods of a third person under an execution and sells them. He is liable in an action of trover. Proof of sale makes out a conversion, no demand being necessary. Hanchett v. Williams, 24 Ill. App. 56.

Fish v. Glass.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee was the wife of Dr. Unger, against whom the appellant Camp had a justice's execution, which the appellant Stephens, as constable, executed, by levying upon a phaeton and selling it to Camp as the best bidder.

The appellee claims that she furnished to her husband the money with which he bought the phaeton for her, and she sued the appellants in trover.

The acts of the appellants were a conversion by both, if the property was hers. *Follet v. Edwards*, 30 Ill. App. 386.

No demand for the property was necessary after an actual conversion. *Hayes v. Mass. Life*, 125 Ill. 626.

If the livery stable keeper had a lien, which the constable discharged, it did not pass to either of the appellants, and was no impediment to her action. *Jones on Liens*, Secs. 983-987.

The only real question in the case is whether the appellee was the owner of the phaeton. Upon that she was the only witness, and the verdict of the jury in accord with the only evidence can not be disturbed. The judgment is affirmed.

Joseph Fish et al. v. Charlotte M. Glass.

1. STATUTE OF FRAUDS—*Contract Void By—No Impediment to Making Another.*—An oral contract to serve another for a year beginning on the first day of the next October, for \$45 per week, is not binding upon the parties under the statute of frauds, but it is no impediment to their making a new contract upon the same subject-matter.

2. DAMAGES—*Breach of Contract of Employment.*—Where a person is employed for a stated period and discharged without cause, in estimating the damages, it is proper to deduct from the loss of wages what such party earned or might have earned, elsewhere, during the period of idleness, but the burden of proof is on the defendant to show the amount of such earnings or possible earnings.

3. PLEADING—*Similiter.*—A similiter is not absolutely necessary.

4. JURORS—*Improper Examination of.*—In an action to recover wages, a juror, on his *voir dire*, testified in reply to questions put by defendant's counsel that he once had difficulty with his employers touching payment of wages. Counsel for defendant then inquired of the juror whether the

trouble or difficulty in question would prejudice him against the defendants in the trial of the case, but the court ruled that the question was improper. *It was held*, the ruling was right.

5. SAME—*Essentials of the Proceeding*.—The only purpose in examining jurors is to ascertain whether they can try this case fairly. As to what a juror would do under the particular state of proof is not a proper matter of examination.

Memorandum.—Assumpsit for wages. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 30, 1894.

The opinion states the case.

APPELLANTS' BRIEF, NEWMAN & NORTHRUP AND S. O. LEVINSON, ATTORNEYS.

It was the duty of the plaintiff to make such efforts and in every way to strive to reduce the damage, if any, she might suffer by reason of the alleged wrongful discharge, and failing so to do, she can not recover. Wood on Master and Servant, p. 238 (Ed. 1877); Polk v. Daly, 14 Abb. Pr. Rep. (N. S.) N. Y. 156.

A juror who, on his *voir dire* has a preference in case the evidence is evenly balanced, is properly challenged for cause. Thompson on Trials, Vol. 1, Sec. 73; Mina Queen v. Hepburn, 7 Cranch. (U. S.) 290; Meaux v. Whitehall, 8 Brad. 173; Chicago, etc., Co. v. Adler, 56 Ill. 346; Chicago, etc., Co. v. Buttoff, 66 Ill. 347; Galena, etc., Co. v. Haslam, 73 Ill. 494; Richmond v. Roberts, 98 Ill. 472.

The contract set out in the declaration was not within the purview of the statute of frauds, but was alleged to be a simple contract for one year, to commence *instantly*. A defendant need not plead the statute of frauds unless the contract within its purview is alleged against him in the declaration. Taylor v. Merrill, 55 Ill. 52; Runde v. Runde, 59 Ill. 98; Meyers v. Schemp, 67 Ill. 469.

APPELLEE'S BRIEF, ST. JOHN, FRENCH & MERRIAM,
ATTORNEYS.

He who prevents anything being done shall not avail himself of the non-performance thus occasioned. Bebee v.

Whitehead, Breese, 174; Meyers v. Geer, 59 Ill. 436; People ex rel. v. Olden, 82 Ill. 93; Newcomb v. Brackett, 16 Mass. 161; Smith v. Lewiss, 26 Conn. 110.

Tender to one who announces in advance that he will not receive it is unnecessary. Thayer v. Meeker, 86 Ill. 470; 2 Greenleaf on Evidence, Sec. 603; Lacy v. Wilson, 24 Mich. 479.

When a party can show that the other prevented his performance of the contract, it is to be taken as *prima facie* true, that he would have performed it, had he not been prevented. McCreary v. Green, 38 Mich. 172.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

It clearly appeared on the trial of this case by the testimony of one of the appellants, who were conducting a business having in it what was called a Parisian Suit Department, that in September, 1892, they made a bargain with the appellee, who was then in their service in that department, to serve them for a year, beginning on the first day of the next October, for \$45 per week.

There was no writing, and, as the brief of the appellants truly says, the statute of frauds prevented that bargain from binding the parties.

It was no impediment to their making a new one.

Then, also, from the testimony of the same appellant, it appears that early in October, the appellee had an offer of another place, upon better terms, and then the parties made a new bargain, that she should have \$50 per week for the year. The statute of frauds is not in the way of this bargain, as the time in which it was to be performed was then less than a year. Early in July, the appellants, on account of exigencies of their own business, and admittedly for no fault of the appellee, discharged her, and have paid her nothing since. She remained idle, wanting work. She has in this suit recovered the amount of her wages from the time of discharge to October 1, 1893.

There can be no defense to a suit like this except to deduct from the claim of the appellee what she earned or might

have earned, elsewhere, during the period of idleness; and the burden of proof was on the appellants to show how much that was, or should have been. *Fuller v. Little*, 61 Ill. 21; *Wood, Mas. & Serv.* 238.

She testified to unavailing efforts she made to obtain other employment, and her readiness to fulfill her engagement with the appellants is an almost necessary inference. If they wished to revoke the discharge, they should have notified her.

On the merits there can be no reasonable complaint of the judgment.

The case was tried upon a "short cause calendar," against the objection and exception of the appellants. It appears that the plea was filed before the declaration was, but that does not prevent the two making an issue. No other plea was ever filed, and the case was tried upon the issue then made. No similitur is absolutely necessary. *Hazen v. Pierson*, 83 Ill. 241.

There is some confusion in the record as to identity of the affidavit upon which the cause was brought on for trial, but we can not find that there was any irregularity, and for such mere technicalities we do not make a very anxious search.

The real grievance on the part of the attorneys of the appellants, or at least that of which their complaint is most emphatic, is shown by the following extracts from the record:

"James D. Johnson, on his *voir dire*, testified in reply to questions put by defendant's counsel that he had difficulty with his employers touching payment of wages. Thereupon the counsel for defendants inquired of the said juror whether the trouble or difficulty in question would prejudice him against the defendants in the trial of this case, but the court ruled that the question was improper, and that the juror need not answer the question, to which ruling of the court the defendants by their counsel then and there duly excepted."

"Edward Ryan, a juror, on his *voir dire*, testified: I am a fur dresser, employed at 198 Division street; working for

Bromberg; don't know the plaintiff; never heard of this suit; never had any trouble with my employers, or dispute about wages.

Q. Let me ask you here: Suppose in this case that the court instructs you that the plaintiff—

The Court: I won't permit such questions—as to what they would do on a certain state of proof.

(To which ruling of the court the defendants by their counsel then and there duly excepted.)

Mr. Northrup: Now, let me ask you, if the evidence were equally balanced—

The Court: That you need not answer.

(To which ruling of the court the defendants by their counsel then and there duly excepted.)

Mr. Northrup: Suppose, Mr. Ryan, that in this case the plaintiff could put in evidence—

The Court: I won't permit that kind of examination at all.

(To which ruling of the court the defendants by their counsel then and there duly excepted.)

The Court: The only question that seems to me to be in this matter is, whether they can try this case fairly. Now, as to what he would do under the particular state of proof, I don't think it is a proper matter of examination.

Mr. Northrup: I don't see, your honor, how I can determine whether a juror has a prejudice or not unless I examine him on that behalf."

* * * * *

"The Court: Any further questions of this witness?

Mr. Northrup: I will see shortly.

The Court (immediately): Well, you may be excused.

Mr. Northrup: If the court please, I wish to note an exception to the court's ruling, and to state that I simply desire to confer with my associate counsel, Mr. Levinson, for a moment.

The Court (immediately): Is there any further question to be asked of the witness? Otherwise, I will excuse her. Is there anything on the re-direct?

Exception by defendants."

There is too much of the same sort as to jurors to put in the whole; it occupies eleven printed pages of the abstract.

That this preposterous method of examining jurors did at one time have the sanction of the Supreme Court, is no excuse for continuing it, since the decision in *C. & A. R. R. v. Fisher*, 141 Ill. 614.

It is an extension of a vicious practice which grew up—how, probably nobody can tell—in criminal cases, and described and reprobated by Gaston, Judge, one of the ablest who ever sat on the bench of any State, in *State v. Benton*, 2 Dev. & Bat. Law, 196, at page 221.

A judge regardful of his duty, desires to dispatch business with some regard to the interests of the public; and under the ermine of the judge, is the cuticle of the man. *Anglo-American P. & P. Co. v. Baier*, 31 Ill. App. 653.

Justice is done and the judgment is affirmed.

First National Bank of Chicago v. Charles W. Kelsay.

1. **BANKS AND BANKING—*Right to Appropriate Balances.***—A bank having money deposited on call, may apply the same to the payment of the demand notes of the depositor held by it, without first demanding payment of the notes.

Memorandum.—Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed April 30, 1894.

The opinion states the case.

APPELLANT'S BRIEF, ORVILLE PECKHAM, ATTORNEY.

Money deposited in a bank does not remain the property of the depositor upon which the bank has a lien only, but it becomes the absolute property of the bank, and the bank is merely a debtor to the depositor in an equal amount. *Foley v. Hill*, 1 Phillips, 399, and 2 H. L. Cas. 28; *Bank of Republic v. Millard*, 10 Wall. 152; *Carr v. Nat. Security Bank*,

107 Mass. 45. So long as the balance of account to the credit of the depositor exceeds the amount of any debts due and payable by him to the bank, the bank is bound to honor his checks, and liable to an action by him if it does not. When he owes to the bank independent debts, already due and payable, the bank has the right to apply the balance of his general account to the satisfaction of any such debts of his. But if the bank, instead of so applying the balance, sees fit to allow him to draw it out, neither the depositor nor any other person can afterward insist that it should have been so applied. *Nat. Mahaiwe Bank v. Peck*, 127 Mass. 298; *Commercial Bank v. Hughes*, 17 Wend. 94; *Home Nat. Bank v. Newton*, 8 Brad. 563; *Marsh v. Oneida Central Bank*, 34 Barb. (N. Y.) 298; *Second Nat. Bank v. Hill*, 40 Am. Rep. 239; *Morse on Banks and Banking* (3d Ed.), Sec. 337.

KING & GROSS, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The real facts of this case, although easily made the text for vituperation, are not difficult of ascertainment, and furnish a complete defense to the bank.

Cheverton, Martin & Co., doing business under the name of West Chicago Bank, were customers of the appellant. June 2, 1893, Cheverton had conversations with the vice-president of the appellant bank, the result of which was that the vice-president advised Cheverton to close his doors. On the books of the appellant there stood to the credit of the West Chicago Bank \$598.16, but as on the credit side of the account items were entered which were not yet collected, it could then be told that some of those items would not have to be charged back for non-payment.

The appellant held the demand note of Cheverton, Martin & Co. for \$5,000. Clearly, as a first step toward applying as payment on that note, the balance that Cheverton, Martin & Co. had with the appellant, the vice-president had the apparent balance put into a certificate of deposit, payable to an officer of the appellant as such officer, and charged it in

the account. On the 5th, finding that eighty-eight cents of the items had come back unpaid, the first certificate of deposit was credited to the account, the item charged, and a new certificate issued for \$597.28 and charged to the account. On the 9th that certificate was applied as a credit upon the note.

The right to apply the credit balance as payment on the note existed without reference to the financial condition of Cheverton, Martin & Co. The steps, begun on the 2d, in the exercise of that right, took off of the books of the appellant, all appearance of a fund upon which Cheverton, Martin & Co. could check, and the particular method of book-keeping, by which the application was finally made to appear, concerned nobody but the appellant. The appellee held checks of West Chicago Bank on appellant to the amount of \$500, which were presented for payment and payment refused June 5th.

The testimony on the part of the appellee is that again on the 8th the checks were presented, and that the officers of the bank said that the debt of the West Chicago Bank to the appellant was not due, but still payment was refused.

It appears that the steps taken on the 2d and 5th as to certificates of deposit and charging the account, were by other officers than those seen on the 8th. Whatever may have been said on the 8th, the rights and obligations of the parties are dependent upon the real facts.

The court refused an instruction asked by the appellant, as follows :

“ The jury are instructed, that in order for the holder of a check to maintain an action thereon against the bank on which it is drawn, he must show that when it was presented for payment, the bank owed the drawer a sufficient sum to pay it; and that, therefore, in this case, if they find from the evidence that on June 2, 1893, the West Chicago Bank had a credit balance in its account as a depositor with the defendant of \$597.28, or thereabouts, but that the defendant, on that day or thereafter, prior to the presentation of the checks in suit to the defendant for payment, appro-

St. John v. College of Physicians & Surgeons

priated the said balance as a payment on account of a note of said West Chicago Bank to the defendant, payable on demand, in consequence of which appropriation there were no funds of said West Chicago Bank in the hands of the defendant for payment of checks when said checks were presented for payment, then the law is that the defendant had the right to make such appropriation, and moreover had the right to make it without first demanding payment of the note, and the verdict should be for the defendant, and the form of the verdict should be, "We, the jury, find the issues for the defendant."

The instruction should have been given, and on the facts, the court should have granted a new trial.

It is to be assumed that acts done in the ordinary course of business in a bank, by an officer of a bank, are within his authority, and therefore what the vice president commenced on the 2d, was then an appropriation of the credit balance, as it might turn out to be in fact, to the payment of the note.

The judgment is reversed and the cause remanded.

Leonard St. John v. The College of Physicians and Surgeons of Chicago and S. B. Buckmaster.

1. COLLEGE OF PHYSICIANS—*Construction of By-Law.*—A by-law of a college, providing that the stock of a teacher leaving the college shall be purchased and held for the use of his successor before the vacant chair shall be occupied by another teacher, providing the previous teacher is willing to sell his stock, refers only to the stock of the outgoing teacher, and the purchase of it is contingent upon his willingness to sell. A person holding stock for his use is not within the by-law.

Memorandum.—Bill for relief. Appeal from the Circuit Court of Cook County; the Hon. SAMUEL P. McCONNELL, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 30, 1894.

The opinion states the case.

VOL. 54.] St. John v. College of Physicians & Surgeons.

ST. JOHN & PATTISON, attorneys for appellant.

GURLEY & WOOD, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The bill filed by the appellant alleges that he owns ten of the three hundred shares of \$100 each, into which the stock of the college is divided.

That the by-laws provide that no one shall fill a chair as professor in the college without twenty shares having been procured for his use; and that the stock of any such teacher leaving the college shall be purchased and held for the use of his successor before the vacant chair shall be occupied by any teacher, provided the previous teacher is willing to sell his stock.

That one Benson was elected or appointed to a chair, and acquired ten shares from his predecessor, and the appellant acquired from that predecessor his other ten shares, and held them for the use of Benson while Benson occupied the chair. That Benson left the college, and the college, without notice to or consent of the appellant, did appoint or elect one Buckmaster to the chair, neither he nor the college buying the ten shares held by the appellant, although he has demanded that it should be bought from him.

At the hearing the appellant desired by an amendment to insert some loose charges of "in fraud of," etc.; also allegations that the appellant bought the stock relying upon the by-law, believing that when Benson vacated, his successor or the college, would be legally bound to take the stock of the appellant, and that if an injunction is not granted to him restraining Buckmaster from teaching from the chair and the college from appointing another thereto, the shares of the appellant will become greatly depreciated and worthless in the hands of any other than those persons connected with the college. How that consequence was to follow was not stated, but in the view we take of the case it is not material. The Circuit Court refused to permit the amendment.

The by-law as stated in the appellant's abstract is—"and the stock of any such teacher leaving the school or college

Kimbell v. Miller.

shall be purchased and held for the use of his successor before the vacant chair shall be occupied by any teacher, provided the previous teacher is willing to sell his stock."

The letter of the by-law refers only to stock of the outgoing teacher, and the purchase of it is contingent upon his willingness to sell. Anybody holding stock for his use is not within the by-law. Upon this single ground without considering the many questions raised by counsel, the decree of the Circuit Court sustaining a demurrer to, and dismissing the bill, is affirmed.

**Charles B. Kimbell v. E. Bruce Miller, a Minor, by His
Next Friend, William G. Miller.**

1. TRESPASS AND CASE—*Distinction Abolished*.—Sec. 21, Ch. 110, R. S., abolishes the distinction as to form, between the common law actions of trespass and case.

2. PLEADING—*Case and Trespass*.—A declaration which in the caption calls the action case, while the counts are in trespass, and states in one count, that without legal process, the defendant "had the plaintiff taken by force and against his will to a police station," and in the other "caused the plaintiff to be arrested," followed in each by an averment of being kept in prison, is sufficient on general demurrer or after verdict.

8. DEMURRER—*Error in Sustaining, When Material*.—It is immaterial whether a special plea to which a demurrer was sustained is good or bad, when the defendant in the evidence, and by instructions, has had the full benefit of the matter contained in the plea.

MR. JUSTICE WATERMAN dissents.

Memorandum.—Trespass. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 30, 1894.

The opinion states the case.

APPELLANT'S BRIEF, MATTHEWS, DICKER & HUGHES,
ATTORNEYS

The declaration should have been in trespass. Trespass is the only remedy for a menace attended with consequent

damages, and for an illegal assault, battery and wounding or imprisonment when not under color of process. 1 Chitty's Pleadings, 167; Puterbaugh's Common Law Prac., 544.

If the plaintiff mistakes his form of action, he will meet with a non-suit. Puterbaugh's C. L. Prac., 542.

APPELLEE'S BRIEF, CASE, HOGAN & CASE, ATTORNEYS.

We do not consider the contention of appellant, that the declaration should be in trespass, tenable, as the distinctions between actions of "trespass" and "trespass on the case," are abolished. Starr & Curtis' Statutes, page 1787, Sec. 21; Krug v. Ward, 77 Ill. p. 603.

Where the same point was raised in the case of Barker v. Koozier, 80 Ill. 206, the Supreme Court say:

"We are unable to appreciate the force of this position in view of our present statute, which abolishes the distinctions between actions of trespass and trespass on the case. Under the statute abolishing all distinctions between the two forms of action, we can not perceive any foundations for such an objection as that one count is in case, and the other two in trespass, and that trespass and case can not be joined."

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Sec. 21, Ch. 110, R. S. 1872, has abolished the distinction as to form between trespass and case, and if a cause of action is shown by the declaration in either form, it may be called the other. St. Louis V. & T. H. R. R. v. Town of Summit, 3 Ill. App. 155.

Here the declaration in the caption or *queritur* calls the action case, and the counts are in trespass, in a blundering way. They state that without legal process, the appellant "had the plaintiff taken by force and against his will to a police station" in one count, and in the other "caused the plaintiff to be arrested," followed in each by averment of being kept in prison. The counts state circumstances which are the grounds of an action in trespass.

The declaration is sufficient on general demurrer or after

verdict. It was proved by the testimony of both parties. There is testimony that the father of the appellee waived any right of action, the appellee being a boy of twelve years. The jury found specially against the waiver, and even if they had found the other way, the boy would not have been bound by the waiver. *Atchison, etc., R. R. v. Elder*, 50 Ill. App. 276, 36 N. E. Rep. 565.

Whether a special plea, to which a demurrer was sustained, was good or bad, is now immaterial, as the appellant, in the evidence and by an instruction, had the full benefit of the matter the plea contained. See cases cited in *Wineman v. O'Berne*, 40 Ill. App. 269.

The appellant's brief opens with this sentence: "Our principal contention in this case is that the jury below found the appellant guilty in utter disregard of the evidence."

It would do no good to recite the evidence, and we have only to say of it, that while fully satisfied that the verdict is for the right party, we should have been better satisfied if it had been for a smaller sum.

But as it is, it does not appear to have been the result of passion or prejudice on the part of the jury; but may have been only their deliberate, intelligent and impartial judgment as to the reparation due for a forcible arrest, pulling through streets and alleys for several squares, and commitment to a cell in a police station; acts done in anger, without legal justification. The judgment is affirmed.

WATERMAN, J., dissents as to amount of damages.

**The Great Western Telegraph Company, for use, etc.,
v. Charles Mears.**

1. **AMENDMENTS—Discretion to Permit.**—It is not error to allow the defendant to file a verified plea on the call of the docket for trial.

2. **RATIFICATION—Subscription to Capital Stock.**—Where a subscription to the capital stock of a corporation is made in the name of another without his authority, he may ratify it by making payments on the subscription; but in a disputed case, whether such payments are made with

full knowledge of the circumstances, and whether with intent to ratify it, or to buy his peace, is a question for the jury.

Memorandum.—Assumpsit for installments of subscription. Error to the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed March 26, 1894.

The opinion states the case.

THOMAS J. SUTHERLAND and LESTER H. STRAWN, attorneys for plaintiff in error.

HENRY C. NOYES, attorney for defendant in error.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The defendant in error, as well as below, is sued as a stockholder of the plaintiff in error for an installment upon his subscription.

The question in the case is one of fact: Did he subscribe or ratify the subscription?

That he did not subscribe with his own hand is conceded, but it is contended that the court erred in permitting the defendant to put the execution of the subscription in issue by a verified plea, when, on a preliminary call, the case had been called for trial, and in fact went to trial in four days thereafter.

The cases cited to support that contention do not support it. They are *Fisher v. Greene*, 95 Ill. 94, and *Fielding v. Fitzgerald*, 130 Ill. 437, and only decide that it is not error to refuse leave to change the issues upon mere request, not accompanied by any affidavit of special circumstances. No case is cited—probably none can be cited—holding that since the revision of the statutes in 1872, granting leave to amend, is error.

The court gave to the jury, on behalf of the plaintiff, the following instructions:

1. If the jury believe, from the evidence, that the defendant executed and delivered to the plaintiff the contract introduced in evidence, to take and pay for one hundred

shares of the capital stock of the plaintiff, of the par value of \$2,500, and that he had never paid thereon, previous to July 10, 1886, to exceed the sum of \$1,000, then the court instructs the jury, as a matter of law, that there still remained due to the plaintiff from said defendant, upon said last mentioned date upon said contract, after such payment, the further sum of \$1,500, and further, that by virtue of, and under the decree of assessment of this court, made by it and entered in the case of Jeremiah Terwilliger and others, against the plaintiff and others, on the 10th day of July, A. D. 1886, and which decree has been introduced in evidence in this case, the defendant became liable to pay the plaintiff the sum of \$875, and which sum became due and payable to the plaintiff, by the defendant, upon and according to the demand of the receiver of the plaintiff.

And you are also further instructed that if you believe from the evidence that the receiver of the said plaintiff, the late Elias R. Bowen, now deceased, either by himself or his authorized agent, gave notice to the defendant of the making of said assessment, and also made demand upon the defendant on the 22d day of December, A. D. 1886, for the payment to him, as such receiver, of the said sum of \$875 within five (5) days from the date of the making of said demand, and which notice and demand was in writing, a copy of which is in evidence in this case, and that the said defendant has not paid the said sum of money so demanded, or any part thereof, then the jury are instructed that the plaintiff is entitled to recover in this action from the defendant the said sum of \$875, together with interest on the same at six (6) per cent per annum, from the 27th day of December, A. D. 1886, to the 1st day of July, A. D. 1891, and at five per cent per annum from said July 1, 1891, to the present time, and the jury will so find in making up their verdict in this case, provided the jury believe from the evidence that Mears signed the subscription, or authorized any one to sign it for him, or afterward ratified it.

2. The court instructs the jury, as a matter of law, that it makes no difference whether the contract of subscription

was actually signed by the defendant Mears, or not, if they find from the evidence that, with full knowledge of the same, he paid thereon, at or about the time it was made, the sum of \$50, and subsequently, in 1881, and under the orders of this court, which are in evidence before you, paid to the receiver of the plaintiff the further sum of \$950, by the release of claims against the plaintiff, and the payment of cash; for in such case, the court instructs you that such payments amounted to a ratification of the said contract by said Mears from its date, and renders the said contract the contract of said Mears, as charged in the declaration in this case, and the jury will so find in arriving at their verdict in this case.

And the court gave to the jury on behalf of the defendant, the following instructions:

1. The jury are further instructed that if they believe from the evidence that at the time said Mears made such payments, he did not see the subscription list, and if the jury also believe from the evidence that Mears did not know whether he had signed it or not, and if the jury further believe from the evidence that afterward he discovered that he did not sign it, such payment, if made under a misapprehension of facts as to his liability, is not evidence of a ratification of the subscription, provided the jury believe from the evidence that Mears did not sign the subscription list, or authorize any one to sign it for him, or ratify the subscription.

2. The jury are instructed that if they believe from the evidence that one Denison signed the subscription list with the name of Charles Mears & Company, and paid thereon the sum of \$50, then, as a matter of law, unless the plaintiff has shown, by a preponderance of evidence, that the said Denison signed the same by Mears' authority, or ratified by Mears, the plaintiff can not recover, and your verdict must be for the defendant.

3. The jury are further instructed that if they believe from the evidence that the defendant, Mears, paid a certain amount on said subscription as a compromise of the claim

made against him, and to avoid a law suit, such payment should not be considered as evidence of a ratification of the signing of the paper sued upon.

4. The jury are instructed as a matter of law, that it is the duty of the plaintiff to prove its case by a preponderance of evidence, and if you find that the plaintiff has not so proved its case by a preponderance of evidence, it can not recover, and your verdict must be for the defendant.

5. The jury are instructed that in this case the defendant has filed a plea, denying the signature to the instrument, and under this plea it becomes the duty of the plaintiff to prove that the defendant, Mears, did sign the instrument or authorize the same to be done, and if said Mears did not execute the instrument sued upon, or authorize it to be done, or ratify it, the plaintiff can not recover.

The defendant had at one time, as recited in the plaintiff's second instruction, paid on the subscription, but whether with full knowledge of the circumstances, and whether with intent to ratify it, or to buy his peace, was, on the evidence, a question for the jury.

The criticism on the use of the word "ratify" in the defendant's instructions, is not open to the plaintiff, as they follow the example set by the plaintiff's. *City of Chicago v. Moore*, 40 Ill. App. 332.

If a subscription was made in the defendant's name, without his authority, he might ratify it. If he did, he is bound as if he had made it himself. If he did not, he is not bound. There is no doctrine of estoppel applicable to the case without such ratification, on the assumption of want of original authority. Whether upon the question of original authority, or of ratification, we should have come to the same result as the jury, we need not say.

Those questions were for them to decide upon the evidence, and the judgment must be affirmed.

A. Egerton Adams v. Chicago Trust & Savings Bank.

1. **COURTS—Judicial Favor.**—When a party has to ask a favor of the court, if he shows no reason for the favor, he can not complain of its refusal.

2. **PRACTICE—All Pleas to Be Filed at Same Time.**—All pleas should be filed at the same time; if any good reason exist for permitting the filing of pleas by piecemeal, it should be made to appear.

3. **SAME—Filing Additional Pleas—When Properly Refused.**—If, in effect, the pleas offered for filing are but to show a parol agreement contemporaneous with the making of a note, and inconsistent with it, they are properly refused, as all precedent and contemporaneous parol agreements are merged in the note.

Memorandum.—Assumpsit on promissory note. Appeal from the Circuit Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed April 30, 1894.

The opinion states the case.

MAHER & GILBERT, attorneys for appellant.

APPELLEE'S BRIEF, ASHCRAFT & GORDON, ATTORNEYS.

If a party desires to file additional pleas he must obtain leave of the court, and it is in the discretion of the court whether such leave will be given; if this discretion is not abused it is not error to refuse. *Bemis v. Horner*, 44 Ill. App. 317, 145 Ill. 567; *Bensley v. Brockway*, 27 Ill. App. 410; *Lincoln v. McLaughlin*, 74 Ill. 11; *Millikin v. Jones*, 77 Ill. 372; *Bryant v. Danas*, 3 Gil. 343; *Ricker v. Scofield*, 28 Ill. App. 32; *Haas v. Stenger*, 75 Ill. 597.

The maker of an absolute note can not show an oral contemporaneous agreement which makes the note payable only on a contingency. *Walker v. Crawford*, 56 Ill. 444; 2 *Parsons N. & B.* 508; *Neeley v. Lewis*, 5 Gilm. 31; *Lane v. Sharpe*, 3 Scam. 566; *Miller v. Wells*, 46 Ill. 46; *Jones v. Albee*, 70 Ill. 34; *Mason v. Burton*, 54 Ill. 349; *Conwell v. Railroad Co.*, 81 Ill. 232.

Adams v. Chicago Trust & Savings Bank.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action on a promissory note, brought by the assignee thereof.

September 19th the defendant filed a plea of the general issue and therewith an affidavit by George J. Cantivary that he is the agent of the defendant, and he verily believes he, A. Egerton Adams, has a good defense to the suit upon the merits.

Upon the 22d day of the following January the cause was, at the request of the defendant, continued to and put down for hearing on the morning of Monday, the 29th day of January. On Saturday, the 27th day of January, the defendant asked leave to file five additional pleas, which request the court refused; whereupon the cause was, at the request of the defendant, continued to February 5, 1894. Upon the day last named the parties appeared, a jury was impaneled, and the plaintiff then and there offered to permit the defendant to introduce any evidence that would be admissible under special pleas. The attorney for the defendant then stated that leave to file special pleas having been denied him, he was not prepared to offer any evidence that would come under the additional pleas, thereupon there was a verdict and judgment for the plaintiff.

We do not think there was any abuse of discretion by the court in its refusal to allow the filing of additional pleas. No reason showing why they were not filed with the general issue was given. When a party is in a position that he has to ask a favor of the court, if he adduce no reason for an extension of grace to him, he can not complain of its refusal.

All pleas should be filed at the same time; if any good reason exist for permitting the filing of pleas by piecemeal it should be made known. *Bemis v. Horner*, 44 Ill. App. 317, 145 Ill. 517; *Milliken v. Jones*, 72 Ill. 372.

In effect the pleas offered are but to show a parol agreement contemporaneous with the making of the note, inconsistent with it; this is not permissible; all precedent and contemporaneous parol agreements are merged in the writ-

ten instrument. Walker v. Crawford, 56 Ill. 444; 2 Parsons' N. & B. 508; Neeley v. Lewis, 5 Gilm. 31; Lane v. Sharpe, 3 Scam. 566; Miller v. Wells, 46 Ill. 46; Jones v. Albee, 70 Ill. 34; Mason v. Burton, 54 Ill. 349; Connell v. Railroad Co., 81 Ill. 232.

The judgment of the Superior Court is affirmed.

**Sarah E. Bromwell v. Alfonso B. Schubert, Admin-
istrator of the Estate of Henry H.
Bromwell, Deceased.**

1. ADMINISTRATION OF ESTATES—*Jurisdiction of the Probate Court.*
—The jurisdiction of the Probate Court is ample and complete, to determine whether a person has a valid claim against a deceased person.

Memorandum.—Bill in chancery. Error to the Circuit Court of Cook County: the Hon. SAMUEL P. McCONNELL, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed March 26, 1894.

The opinion states the case.

J. KENT GREEN, attorney for plaintiff in error.

MATTHEW P. BRADY, attorney for defendant in error.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

We shall avoid any allusion to the merits of this case. In whatever shape the controversy may hereafter be presented, no intimation of our present opinion will appear to the benefit or injury of either party.

The case presented by the plaintiff in error is that she loaned her husband, Henry Bromwell, in 1876 and 1877, \$7,000; that in 1886 he died, and the defendant in error is administrator of the estate under letters granted July 21, 1886.

The jurisdiction of the Probate Court is ample and complete, to determine whether she has any valid claim, and

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whether there are equitable reasons why any obstacles in her way should be removed or disregarded. *Shepard v. Speer*, 140 Ill. 238, and the multitude of cases there cited.

There is in this State no reason for resorting to any other than the Probate Court in any case where the actor wants relief only from the assets under the control of that court, and so resorting leads to great confusion and expense.

The bill in chancery of the plaintiff in error was properly dismissed and the decree is affirmed.

Katerina Kripner v. Rad Lincoln, C. S. P. S., etc.

54	675
57	220
54	675
66	533

1. **PLEAS**—*Striking from Files*.—Where a defendant filed a plea of the general issue verified, and on the trial testified positively that he did not sign the verification, on motion of plaintiff's counsel, the court struck it from the files. This was held error, as the defendant was entitled to have it stand as an unverified plea, and to make any defense under it admissible under the general issue.

2. **PRACTICE**—*Where Defendant Admits Execution of Note*.—Although a defendant admits the execution of a promissory note, he will be permitted to deny that, as executed, it became his personal obligation without a verified plea.

3. **PROMISSORY NOTES**—*Presumptions as to Execution of Signatures*.—A signature at the bottom of a note, on the right hand side, is *prima facie* evidence that it was affixed there in the character of maker, while the same signature at the left hand side furnishes equally satisfactory evidence that it was placed there as a witness to the instrument.

Memorandum.—Assumpsit. Error to the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed March 26, 1894.

The opinion states the case.

JONES & LUSK, attorneys for plaintiff in error.

J. F. KOHOUT, attorney for defendant in error.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

Judgments by confession were entered against the plaintiff in error, and two others, as maker of two promissory notes.

The notes and powers of attorney to confess judgment were substantially alike except as to amounts and dates. The one earliest in date was as follows:

§100. CHICAGO, August 18, 1893.

One year after date, we jointly and severally promise to pay to Rad Lincoln, Cis. 52, C. S. P. S., or order, the sum of \$100, with interest at the rate of six per cent per annum, payable after date, annually.

Value received.

KATERINA KRIPNER.

MATEJ KRIPNER,
MARTIN KRIPNER.

Know all men by these presents, that, whereas, the subscribers, Matej Kripner and Martin Kripner, are justly indebted to Rad Lincoln, C. 52, C. S. P. S., upon a certain promissory note, bearing even date herewith, for the sum of \$100 and no cents, made payable to said Rad Lincoln, Cis. 52, C. S. P. S., or order, and due one year after date thereof.

Now, therefore, in consideration of the premises, and of the sum of \$1, to us in hand paid by the said Rad Lincoln, Cis. 52, C. S. P. S., the receipt whereof is hereby acknowledged, we do hereby make, constitute and appoint Adolph Kraus, or any attorney in any court of record, to be our true and lawful attorney, irrevocable, for us and in our names, place and stead, to appear before any court of record, in term time or vacation, in any of the States or Territories of the United States, at any time after maturity, to waive service of process, and confess a judgment in favor of the said Rad Lincoln, Cis. 52, C. S. P. S., or his or their assignees, upon the said note for the above sum, or for as much as appears to be due according to the tenor and effect of said note, with interest thereon, together with costs; also for \$10 attorney's fees, to be added to the amount due on entering

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up judgment; also to file a cognovit for the amount that may be so due, with an agreement therein that no writ of error or appeal shall be prosecuted upon the judgment entered by virtue hereof, nor any bill in equity filed to interfere in any manner with the operation of such judgment, and to release all errors that may intervene in the entering up of such judgment, or issuing execution thereon, and also to consent to immediate execution upon such judgment, hereby ratifying and confirming all that our said attorney may do by virtue hereof.

Witness our hands and seals this 18th day of August, A. D. 1883.

In the presence of
CHAS. DRABEK.

MATEJ KRIPNER, [SEAL.]
MARTIN KRIPNER, [SEAL.]
KATERINA KRIPNER.

Afterward, leave was given to Martin Kripner and Katerina Kripner to plead in said causes—the judgments to stand as security—and pleas were filed.

She pleaded the general issue verified, and a special plea. To the special plea a demurrer was sustained, and the cause went to trial on the plea of Katerina Kripner, as sole defendant, of the general issue verified, the other defendants having died in the meantime.

The verified general issue put the execution of the notes in issue, and testimony on the part of the plaintiff was heard on that issue, and such testimony had some slight tendency, also, to show that she had previously admitted her liability on the notes, as a maker of them.

The defendant, Katerina Kripner, the plaintiff in error in this court, testifying in her own behalf, denied that she signed the notes, or had ever admitted her liability on them. Then, on cross-examination, she was shown what purported to be her signature to the verification of her plea of the general issue, and asked if that was her signature.

After answering that she could not see it, and that she had not her spectacles with her, she testified that she did not sign anything; that she did not know whether the signature was hers or not, and that she had not signed her

name to any paper since she sold her house ten years ago. And, on re-examination by her counsel, she testified positively that she did not sign the verification.

Thereupon, on motion of plaintiff's counsel, the court struck her verified plea of non-assumpsit from the files. Thereupon her counsel moved for leave to verify the plea then and there, which was denied, and the court, refusing all instructions offered by either party, directed the jury to bring in a verdict for the plaintiff for the amount of the principal and interest of the notes, and judgment was entered on such verdict.

It was error to strike the plea from the files. The defendant was entitled to have her plea stand as an unverified one, and thereunder to make any defense open to her under an unverified plea of the general issue.

While it is apparent that the defendant is an ignorant woman, and advanced in years, and quite likely, testified recklessly, although testifying, as she did, through an interpreter, it is not improbable that she testified mistakenly; her testimony would have afforded justification for striking out the verification of her plea, but did not justify the order striking the plea itself from the files, which was, in effect, visiting punishment upon her, a thing the court could not do, notwithstanding her derelictions. *Gordon v. Gordon*, 141 Ill. 160; *Ibid.* 41 Ill. App. 137.

The plea of the general issue unsworn to, would have enabled her to show that she was not bound by the notes, although it would not have enabled her to deny their execution.

Although a defendant shall admit the execution by himself of a promissory note he will be permitted to deny that, as executed, it became his personal obligation, and this without a verified plea. *Frankland v. Johnson*, 147 Ill. 520; *Stevenson v. Farnsworth*, 2 Gil. 715.

It will be observed by looking at the note and warrant of attorney copied above, that Matej Kripner and Martin Kripner affixed their names on the right hand side of the bottom of the instrument, and that the name of the plaintiff

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in error, Katerina Kripner, is placed on the left hand side of the bottom.

It will be further seen that, although the three names are affixed in the usual place at the bottom of the warrant of attorney, two of them with a seal and hers without, the recital in the body of the warrant of attorney is that "the subscribers, Matej Kripner and Martin Kripner are" the persons indebted upon the note.

In *Camden v. McKoy*, 3 Scam. 436, it is said, on page 447:

"Whilst the law requires no particular form of words to constitute a promissory note, and designates no particular place at which the owner (maker) shall affix his name, in order to establish his liability in that capacity, yet, by the universal consent and acquiescence of commercial and business men, custom has established and sanctioned a form and mode of signing, which furnishes a legal presumption of the intention of the parties, and the precise character of the liability attaching to the signature, which presumption may, in many cases, be rebutted by parol evidence.

For instance, a signature at the bottom of a note, on the right hand side of the paper, is *prima facie* evidence that it was affixed there in the character of maker, whilst the same signature, at the left hand side of the paper would furnish equally satisfactory evidence that it was placed there only as a witness to the instrument.

So the signature of a third person, upon the back of a note, after the payee has indorsed it, is evidence of a contract to become responsible as second indorser."

Applying the rule of legal presumption so laid down, to the notes in question, Katerina Kripner was a mere witness to the notes, and could not be held as a maker thereof without evidence which should overcome that presumption.

If the evidence that was heard on behalf of the plaintiff had a tendency to overcome such presumption, it was then competent for her testimony, in support of the presumption, to be submitted to and considered by the jury in connection with that on the part of the plaintiff.

The striking from the files of the defendant's plea of non-assumpsit destroyed the issues presented by such plea, and following that order with a direction to the jury to find a verdict against the defendant as maker of the notes, was depriving her of a right to which she was entitled.

The plea should have been allowed to stand as an unverified one, and the question of the capacity in which the defendant's name appeared on the notes should have been left to the jury upon the evidence, with proper instructions. It follows, therefore, that the order striking the plea from the files should be set aside, and that the cause be reversed and remanded.

The point that the bill of exceptions is not properly a part of the record, is not well taken.

The stipulation of the parties under which the original bill of exceptions was attempted to be made a part of the transcript of the record for this court, included several subjects, and when examined as a whole, it is clearly sufficient. Reversed and remanded.

51 680
162s 395

Emil Gasch et al. v. C. L. Niehoff.

1. VERDICT—*Evidence Sustains the Finding.*—Where issues are joined on the allegations upon which a writ of attachment has been issued, and found for the defendant, the Appellate Court declines to interfere.

Memorandum.—Attachment. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1894, and affirmed. Opinion filed May 28, 1894.

The opinion states the case.

KRAFT & KRAFT and F. M. WILLIAMS, attorneys for appellants.

ALBERT H. MEADS, attorney for appellee.

Van Kirk v. Scott.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Issues were joined upon the allegations upon which the writ of attachment was issued, with the result that the jury found for the defendant.

We do not agree with appellants in their contention that the evidence was such that we ought to set aside the conclusion reached by the court and jury before whom the cause was tried.

No other ground for a reversal is urged. The judgment is therefore affirmed.

John D. C. Van Kirk v. Robert S. Scott et al.

1. **CONTRACTS—*In Writing, Not to be Varied by Parol.***—A contract in writing can not be varied or contradicted by parol, but a written instrument, to be a contract in writing, must set forth the undertakings of the parties to it so plainly, as to require neither parol testimony nor the promises or duties to ascertain the extent and force of the contract.

2. **SAME—*What is a Contract, etc.***—A writing, to be a contract in writing, must set forth the undertakings of the parties so plainly as to require neither parol testimony nor the promises or duties which the law would imply from the facts stated in it, to ascertain its extent and force.

3. **SAME—*The Writing, Evidence of What the Contract is.***—A written contract not under seal, is not the contract itself, but only the evidence of it; although where parties have deliberately reduced their contract to writing, such writing is the exclusive evidence of what the contract is.

4. **SAME—*Written Contract Defined.***—A written contract is one which, in all its terms, is in writing.

5. **SAME—*Partly in Parol and Partly in Writing.***—A contract partly in writing and partly oral is, in legal effect, an oral contract.

6. **SAME—*To What the Rule Does Not Apply.***—Unless the instrument is a written contract within the meaning of the law, the rule that parol evidence is incompetent to vary or contradict its terms, does not apply.

Memorandum.—Assumpsit. Error to the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1894. Reversed and remanded. Opinion filed April 30, 1894.

BRIEF OF PLAINTIFF IN ERROR, A. BURTON STRATTON,
ATTORNEY.

It is a well established principle of law, that the rule excluding parol evidence to vary the terms of a written contract, does not apply where the original contract was verbal and entire, and a part of it only reduced to writing. 1 Greenl. Ev. (15th Ed.), Secs. 275, 284; Browne on Parol Ev., Sec. 50; Jones Const. of Contracts, Sec. 130; Stephen's D. L. Ev., Art. 90; Taylor Ev., Secs. 1038, 1049; 2 Phillips Ev., 669, 670; Chitty on Contracts, Sec. 93.

A memorandum of a contract constitutes only one species of evidence of the existence and terms of an agreement; it may not constitute the entire, or only, or even the most direct and explicit proof. Wood v. Williams, 40 Ill. App. 118; Ludeke v. Sutherland, 87 Ill. 481; St. Clair Co. B. So. v. Feitsam, 6 Brad. 151; Bross v. C. & V. R. R. Co., 9 Brad. 363; Birt v. Gillett, 13 Brad. 369; Covell v. Benjamin, 35 Ill. App. 299; Ruff v. Jarrett, 84 Ill. 475; Plumb v. Campbell, 129 Ill. 106; Peterson v. C. R. I. & P. Ry. Co., 80 Ia. 92; 7 Am. & Eng. Enc. L., pg. 91 and cases cited.

Parol evidence is competent to show the circumstances surrounding the making of the contract. Browne on Parol Ev., 126; Taylor on Ev., Sec. 1194; Jones on Const. C. & T. Cont., Sec. 81; Stephen's D. L. of Ev., Art. 91; Robinson v. Stow, 39 Ill. 572; Vermont St. M. E. Ch. v. Brose, 104 Ill. 206; Wilson v. Root, 119 Ill. 379; Thomas v. Wiggers, 41 Ill. 470; Doyle v. Teas, 4 Scam. 202; Turpin v. B. & O. Ry. Co., 105 Ill. 11; Murray v. Strang, 28 Ill. App. 608; Home N. Bk. v. Waterman, 30 Ill. 548.

Parol evidence is also competent to show customs and usages, by which incidents not expressly mentioned in the contract are annexed to it, unless the annexing of such incidents would be repugnant to, or inconsistent with the express terms of the contract. 7 Am. & Eng. Enc. L., 91; Dixon v. Dunham, 14 Ill. 324; Home Ins. Co. v. Favorite, 46 Ill. 263; Lonergan v. Stewart, 55 Ill. 44; Doane v. Dunham, 79 Ill. 131; N. S. Life Ins. Co. v. Advance Co., 80 Ill. 549; Lyon v. Blair, 83 Ill. 33; Gilbert v. McGinnis, 114 Ill. 31; Older-

Van Kirk v. Scott.

shaw v. Knoles, 4 Brad. 63; Everingham v. Lord, 19 Brad. 565.

Parol evidence is also competent to show the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole transaction between them. Morgan v. Griffiths, L. R., 6 Ex. 70; 7 Am. & Eng. Enc. L., pg. 91; Stephen's Dig. Ev. (Am. Ed.), Sec. 163; Jones Const. Cont., Sec. 130; Browne on Parol Ev., 128-129; Bradshaw v. Combs, 102 Ill. 428; Norman v. Waite, 30 Neb. 302; Ball v. Benjamin, 73 Ill. 39; 1 Greenl. Ev., Sec. 284a; 17 Am. & Eng. Enc. L. pg. 435; Brent v. Bk. Metropolis, 1 Pet. 92; Donlin v. Daegling, 80 Ill. 608; Sharkey v. Miller, 69 Ill. 560; Mauran v. Bullus, 16 Pet. 528.

Particularly is such evidence competent, if the separate, oral agreement, sought to be proven, constitutes a condition precedent to the execution of the contract. 17 Am. & Eng. Enc. L. 443; Norman v. Waite, 30 Neb. 302; 7 Am. & Eng. Enc. L. 91; Stephen's Dig. Ev., Sec. 163; Taylor Ev., Sec. 1038.

Parol evidence is also competent to show the meaning of any abbreviation, or technical expression, used in the contract. Jones Const. Cont., 91; Browne on Parol Ev., 116.

BRIEF OF DEFENDANTS IN ERROR, DUNCAN & GILBERT,
ATTORNEYS.

Defendants in error contended that the contract in question had been reduced to writing, and could not be varied or contradicted by parol proof. Orr v. Ward, 73 Ill. 318; Goodrich v. Van Nortwich, 431 Ill. 445; Furnace Co. v. Glasscock, 60 Am. Rep. 748; Hart v. Hart, 22 Barb. 606; Spring v. Ansonia Clock Co., 24 Hun, 175.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The plaintiff in error had worked for the defendants in

error, who are merchants in Chicago, twelve successive years next preceding January, 1891, and in December, 1890, entered into an agreement with them for a further service as salesman, under which he entered upon a new term of service for them, beginning January 1, 1891.

A written memorandum concerning that agreement was produced by the defendants in error, during the examination of the plaintiff in error as a witness in his own behalf, while the cause was on trial, which was as follows:

“ 1891. Will draw at the rate of \$3,750 per annum. If J. D. C. V. incapacitates himself for business by intemperance, his salary will be stopped until he shows himself to be fully recovered and fit for business to the satisfaction of C., P., S. & Co.

J. D. C. VAN KIRK.”

On January 13, 1891, the plaintiff in error was discharged from further employment by the defendants in error, “owing to the manner in which you have conducted yourself in the past,” as expressed in their letter to him.

Suit was brought upon the contract for damages for its breach, and a verdict for the defendants was returned by direction of the court.

The first assigned error is the refusal by the court to admit proper evidence offered on behalf of the plaintiff.

The plaintiff offered to show that the written memorandum was but a partial expression of the agreement between the parties, and to prove what was the agreement with reference to matters not therein expressed, or so imperfectly expressed as to require explanation or interpretation, to ascertain what the real contract was.

The circuit judge held that the memorandum, being in writing, and testified to by the plaintiff in error as being the agreement he made with the defendants in error, and under which he entered upon their service at the beginning of 1891, was complete and conclusive between the parties, and could not be varied or contradicted by parol, and, accordingly, excluded all evidence offered by the plaintiff in error which would tend to show other things than what the

memorandum expressed, as being within the intention and meaning of the parties.

The first question, therefore, is as to the correctness of such ruling.

Looking at the memorandum itself, does it purport on its face to be a complete contract?

What are the mutual undertakings of the parties? Who are the parties to perform and what is to be done? Who is to draw \$3,750? Is that sum the limit of compensation? Who are meant by the initials? Do the figures "1891" indicate the date of the instrument, or something else? Is the "salary" to be stopped under the specified circumstances indicated by the sum to be drawn?

These questions, although not embracing all that might be asked, are sufficient to show that the memorandum, unaided by other evidence, is totally incapable of interpretation or of enforcement. Supposing that the parties to this cause were reversed, would anybody pretend that the defendants in error could maintain an action against the plaintiff in error for a breach of contract, with no other evidence of what the contract was than this memorandum?

There is no question made, but that a valid agreement was entered into between the parties, but its terms, and if in writing as a written contract, are in dispute.

"A written instrument, to be a contract in writing, must set forth the undertakings of the parties to it so plainly as to require neither parol testimony nor the promises or duties which the law would imply from the facts stated, to ascertain the extent and force of the contract." *Illinois Central R. R. Co. v. Miller*, 32 Ill. App. 259.

"It should be borne in mind that a written contract, not under seal, is not the contract itself, but only evidence—the record of the contract." *Wake v. Harrop*, 6 Hurl. & Norm. 768.

Although where parties have deliberately reduced their contract into writing, such writing is doubtless the exclusive evidence of what the contract is. *Memory v. Niepert*, 131 Ill. 623.

“A written contract is one which, in all its terms, is in writing. A contract partly in writing and partly oral is, in legal effect, an oral contract.” Bishop on Contracts, Secs. 163, 164; *Memory v. Niepert*, *supra*.

Judged by the authorities, can it be said that the memorandum introduced in evidence constituted a written contract complete in all its terms? We think not.

“The test of the completeness of the writing proposed as a contract, is the writing itself. If this bears evidence of careful preparation, of a deliberate regard for the many questions which would naturally arise out of the subject-matter of the contract, and if it is reasonable to conclude from it that the parties have therein expressed their final intentions in regard to the matters within the scope of the writing, then it will be deemed a complete and unalterable exposition of such intentions. If, on the other hand, the writing shows its informality on its face, there will be no presumption that it contains all the terms of the contract. In every case, therefore, the writing must be critically examined in the light of its surrounding circumstances with a view of determining whether it is a memorial of the transaction.” Jones on Construction of Commercial Contracts, Sec. 134.

In *Eighmie v. Taylor*, 98 N. Y. 288, it is said: “The writings which are protected from the effect of contemporaneous oral stipulations, are those containing the terms of a contract between the parties, and designed to be the repository and evidence of their final intentions. If, upon inspection and study of the writing read, it may be, in the light of surrounding circumstances, in order to its proper understanding and interpretation, it appears to contain the engagements of the parties, and to define the object and measure the extent of such engagement, it constitutes the contract between them, and is presumed to contain the whole of the contract.”

But “where the writing does not purport to disclose the contract or cover it; where, in view of its language read in connection with the attendant facts, it seems not designed

as a written statement of an ageeement, but merely as an execution of some part or detail of an unexpressed contract; where it purports only to state one side of an agreement merely, and is the act of one of the parties only, in the performance of his promise; in these and the like cases the exception may properly apply, and the oral agreement be shown."

Looking to the written memorandum, therefore, to gather its scope and meaning, there is to be found but a single element of whatever contract the parties may have made, that is complete and does not require extrinsic aid, and that is the provision in reference to the plaintiff incapacitating himself for business by intemperance. And we think it is quite clear that the memorandum was made without any intention that it should contain any evidence of what the agreement was, beyond the protection to the defendants against the intemperance of the plaintiff.

Everything else rests upon conjecture, in the absence of other evidence, unless it may be that the \$3,750, which somebody may draw at some time, and in some proportion, during a year, may be said to express the salary alluded to further on in the writing. But even as to that, how can one say that the mentioned sum does not relate to, and embrace, in addition to salary, such expenses as are not infrequently allowed to salesmen for traveling and entertaining?

The fact that the plaintiff in error testified that the memorandum expressed the contract he made, and went to work under, which is urged as a justification for the exclusion of the offered parol evidence, does not excuse the rejection of all the evidence that was offered and excluded.

It is very apparent from the record that he did not mean to testify that the memorandum contained all that was agreed upon, but that adding to it what he himself knew, it constituted the agreement.

It is common experience in court that witnesses speak of writings, only, as contracts. That there was something not included in his answer that the writing was the only agreement, is clear enough from the fact that he testified to

some matters as being a part of the agreement, which are not expressed or alluded to in the writing.

He did also undertake to testify as to the amount of salary he was to get, but was interrupted by the court, and stopped with the remark "that is in there," alluding to the writing.

In conclusion, we are of opinion that such error was committed in the exclusion of such evidence as was offered, as was necessary to show what the whole contract between the parties was, as demands a reversal and remanding of the cause, and it is so ordered.

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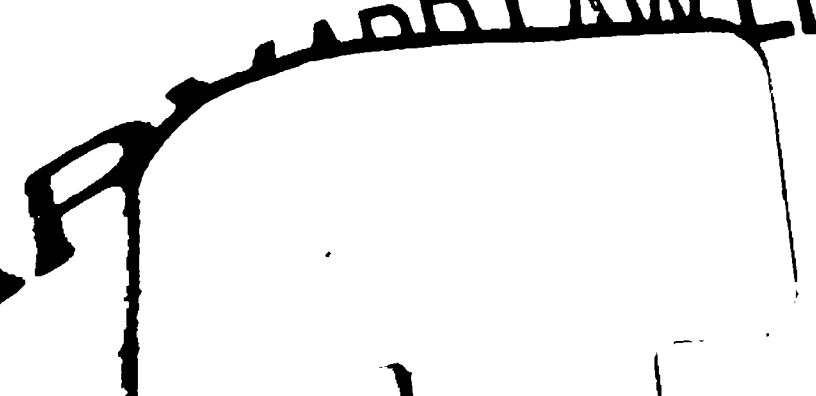
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